TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 106

THE DENVER UNION STOCK YARD COMPANY, PETITIONER,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION

No. 118

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

NO. 106 PETITION FOR CERTIORARI FILED APRIL 17, 1957

CERTIORARI GRANTED JUNE 3, 1957

NO. 118 PETITION FOR CERTIORARI FILED MAY 8, 1957

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IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5459

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a Corporation of Salt Lake City, Utah, Petitioner,

v.

UNITED STATES and EZRA TAFT BENSON, Secretary of Agriculture, Respondents.

PETITION TO REVIEW DECISION AND ORDER OF THE SECRETARY OF AGRICULTURE—Filed August 9, 1956

To the Above-Entitled Court and the Honorable Judges Thereof:

Producers Livestock Marketing Association, herein referred to as Petitioner, petitions this Honorable Court to review the Decision and Order of the Secretary of Agriculture, dated June 18, 1956 and entered June 19, 1956, in proceedings had and taken under the Packers & Stockyards Act 1921, 42 Stat. 159, 163, et seq., 7 U.S.C. § 181, § 201, et seq., entitled "Producers Livestock Marketing Association, Complainant, vs. The Denver Union Stockyard Company, Respondent, P & S Docket No. 2176".

Jurisdiction of the Court

This Court has jurisdiction of the subject matter of this proceeding by virtue of the Administrative Procedure Act, as amended, Chapter 19A (Review of Orders of Federal Agencies) 64 Stat. 1129. Title 5, U.S.C. § 1032. 5 U.S.C.A. Cum. Supp. Volume, 1955 Annual Pocket Part § 1032, Page 236.

Facts on Which Venue Is Based

Petitioner is a Utah corporation. It is authorized to [fol. 2] *to* business in Colorado, New Mexico, Utah and

Wyoming, within the Tenth Judicial Circuit. It has its principal office in Salt Lake City, Utah. Under said Administrative Procedure Act, as amended, Petitioner is therefore entitled to and does file this petition for review in the United States Court of Appeals for the Tenth Circuit.

Nature of the Proceedings as to Which Review Is Sought

This proceeding is brought to review the Decision and Order of the Secretary of Agriculture entered by and through his duly delegated Judicial Officer. The Judicial Officer acted for the Secretary of Agriculture pursuant to authority delegated by the Secretary to the Judicial Officer under authority of the Reorganization Act and Regulations of the Secretary thereunder. 54 Stat. 81. 5 U.S.C. § 516(b). 10 F.R. 13769. 19 F.R. 74.

Petitioner is a "market agency" as defined by the Packers & Stockyards Act. "Market agency" means, under the Act, any person engaged in the business of buying or selling in commerce livestock at a stockyard on commission basis. (In other words, a commission firm.) 7 U.S.C. § 201. Petitioner is duly registered with the Secretary of Agriculture, as required by the Act. 7 U.S.C. § 203.

Denver Union Stockyard Company owns and operates the Denver Union Stockyards (a stockyard "posted" as subject to the Act) at Denver, Colorado. It is thus a "stockyard owner" as defined by the Act. 7 U.S.C. § 201. A "stockyard", under the Act, means any place, establishment or facility commonly known as a stockyard, conducted as a public market, consisting of pens, etc. in which livestock are held or kept for sale or shipment in commerce. 7 U.S.C. § 202.

Petitioner operates and for years has operated as a market agency, buying and selling on commission at the Denver Stockyards, also at other yards throughout the West. It also buys and sells in the country throughout the West.

The Act provides that every stockyard owner (1) must furnish stockyard services on request "without discrimi-

nation", also (2) must establish and observe "just, reason-
[fol. 3] able and non-discriminatory regulations and practices" in the furnishing of stockyard services and every unjust, unreasonable or discriminatory regulation or practice "is prohibited and declared to be unlawful". 7 U.S.C. § 205, § 208.

On May 11, 1955 Denver Union Stockyard Company issued its "Tariff No. 14", effective May 25, 1955. The tariff contained a regulation, Item 10 (c), which was entitled and which purported to deal with "Interference With Operations". This, in effect, said that all market agencies (and dealers) who do business at the Denver Union Stockyard (1) are now prohibited from doing business at outside feed yards or in the country, (2) are now prohibited from diverting or interfering with the "normal flow" of livestock to the Denver Union Stockyard. This regulation concluded with its own definition of "area of normal flow" as being all of Colorado except approximately the East one-sixth (1/6th) thereof, as outlined by designated County boundaries and highways. The regulation is on Page 8 of the Decision.

By this regulation, Petitioner was forced to discontinue entirely its off-yard or country business in the forbidden country area—substantially all of Colorado; otherwise, it would have violated the regulation and undoubtedly suffered eviction from the Denver Stockyards. Therefore, a Petitioner attacked the regulation. It filed complaint against the Stockyard Company with the Secretary of Agriculture, as authorized by the Packers & Stockyards Act. Therein Petitioner pointed out that it was operating and for many years had operated at the Denver Stockyard. Also, at other stockyards in the country throughout the eleven Western States, and that under the Act, the Stockyard Company was a "public utility" and, as such, required to furnish stockyard services without discrimination and establish and observe just, reasonable and non-discriminatory regulations and practices, and that every unjust, unreasonable or discriminatory practice was prohibited and unlawful under the Act, and that Item 10 (c) was, therefore, illegal and void.

The Stockyard Company answered, asserting among other things, its right to so regulate and defending the validity of Regulation 10 (c), giving various reasons claimed to support its position.

[fol. 4] A "Hearing Examiner" made an "Interim Ruling" December 6, 1955, saying he thought the problem required a hearing on "the facts". He set the matter for hearing. To Petitioner, however, the question was solely one of law. Therefore, it elected to stand upon the regulation's illegality as a matter of law. Therefore, it filed its "Complainant's Election to Rest". This stated Petitioner's position (1) that the regulation was illegal and invalid upon its face as a matter of law, (2) that Petitioner elected to stand upon the illegality of the regulation as a matter of law, and, (3) would present no evidence, such being wholly unnecessary to determine the illegality of said regulation as a matter of law, and (4) wherefore, Petitioner therein rested and submitted its case for decision accordingly.

The Stockyard Company then filed a motion to dismiss for plaintiff's failure to "sustain the burden of making a prima facie case as evidenced by its election not to offer any proof".

The Hearing Officer conceded an oral hearing was no longer necessary. He thought the proceeding should be dismissed as demanded and certified the same to the Judicial Officer for decision, recommending dismissal.

Briefs and oral argument followed. The decision and order of the Secretary of Agriculture was entered June 19, 1956 by the Judicial Officer. A copy of said decision is Exhibit "A" hereto attached. The decision and order was that the regulation was not illegal upon its face and the complaint was dismissed.

Grounds on Which Relief Is Sought

The grounds upon which relief is sought and the points on which Petitioner intends to rely are:

1. Denver Union Stockyard Company is, under the Packers & Stockyards Act, 1921, bound and required to furnish stockyard services to Petitioner (and other market

agencies and dealers) without discrimination. It is a public utility in that regard.

2. The regulation in question is illegal and invalid on [fol. 5] its face as a matter of law since it denies service to Petitioner, and will not allow Petitioner to do business on the Denver Stockyards if Petitioner:

(a) Solicits any business for other markets, or for sale at outside feed yards or at country points, or endeavors to secure customers to sell or purchase livestock elsewhere; or

(b) Buys or sells, or does any business whatever, in said forbidden country area (except to route sales and business therein to or from the Denver Union Stockyards).

3. The regulation is illegal and invalid on its face as a matter of law, being in restraint of trade and an attempt, and tending, to monopolize and create a monopoly in trade or commerce, as prohibited by the Anti-Trust Laws of the United States.

The Relief Prayed

Petitioner prays:

That the order and decision of the Secretary of Agriculture hereinbefore mentioned be reviewed by this Court; that said Regulation 10 (c) of Denver Union Stockyard Company be determined and adjudged illegal and invalid and the order and decision of the Secretary be reversed and vacated, and for general relief.

H. P. Thomas, Frank Armstrong, E. M. Garrett,
Thomas & Armstrong, Attorneys for Petitioner.

August 8, 1956.

Filed August 9, 1956 with exhibit.

[fol. 6] EXHIBIT A TO PETITION

United States Department Of Agriculture

Before The Secretary Of Agriculture

Producers Livestock Marketing Association, Complainant v. The Denver Union Stock Yard Company, Respondent, P&S. Docket No. 2176.

Decision and Order

Preliminary Statement.

This is a proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.). On July 7, 1955, Producers Livestock Marketing Association filed a complaint pursuant to section 202.6 (b)[1] of the rules of practice (9 CFR 202.6 (b)) against the respondent. The complaint concerns Item 10 (c) of the respondents' Tariff No. 14 issued May 11, 1955, effective May 25, 1955, quoted below in Finding of Fact 3.

Paragraph 2 of the complaint[2] states that Producers Livestock Marketing Association is a registered market agency that has operated for many years as such at the respondent's stockyard and at other stockyards and that it has engaged in buying and selling at country points for livestock growers.

Paragraph 3 of the complaint submits that Item 10 (c) of the respondent's Tariff No. 14 is unauthorized and in- [fol. 7] valid under the act because (1) under the act the

[1] "§ 202.6 Formal complaints and other moving papers • • • (b) Who may file. Disciplinary proceedings may be instituted only upon moving papers filed by the Administrator, acting either as a result of the informal complaint procedure hereinbefore provided or on his own motion: Provided, That, if the Administrator should so determine, a proceeding filed pursuant to section 304 of the act or a proceeding involving the application of a regulation established or filed pursuant to section 307 of the act, may be instituted upon the moving paper filed by the person who filed the informal complaint."

[2] The paragraphs in the complaint as filed are not numbered but numbers have been assigned for purposes of clarity.

respondent is authorized to file with the Secretary of Agriculture only schedules of rates or practices affecting any rate or charge or regulations or practices in respect to the furnishing of stockyard services, and (2) the contested regulation in Item 10 (c) does not affect any rate or charge and does not relate to the furnishing of stockyard services.

Paragraphs 4 and 5 of the complaint allege that the respondent is a public utility under the act required to furnish reasonable service without discrimination and to establish just, reasonable and nondiscriminatory regulations and practices (sections 304 and 307 of the act), and that Item 10 (c) is unjust, unreasonable and discriminatory and should be set aside as unlawful.

Paragraph 6 of the complaint goes on to contend that under Item 10 (c) market agencies, including the complainant, will be:

"(a) Forbidden to handle livestock in the proscribed area direct to a packer, feeder or other outlet.

"(b) Forbidden to purchase in the proscribed area so as to meet competition and maintain volume for its outlets.

"(c) Forbidden to furnish market advice to its members in the proscribed area except advice that they ship to and sell at the Denver Stockyards. (Our Association is a non-stock farmers' marketing cooperative having members only.

The membership runs throughout the eleven Western States and elsewhere.)

"(d) Forbidden in case of a glut of livestock at the Denver yards, or otherwise to re-consign shipments of livestock to other stockyards; e. g., Omaha, Chicago or elsewhere to the advantage of the grower."

Paragraph 7 of the complaint is as follows:

"Our business has been built up over a period of more than twenty years by successful service to the livestock growers themselves. Some members or growers sell out- [fol. 8] right, others consign to us in the country for direct movement, still others ship to central markets. Many telephone or write our Denver office to inquire about market conditions, about whether to ship to Denver, to the West Coast or to Eastern markets. This Regulation absolutely

forbids in the proscribed area our buying, selling or taking consignments in the country except for movement to the Denver yards, and forbids in the proscribed area our furnishing the market advice or service above—except advice to the grower to ship to Denver Union Stockyards and no place else. It denies the growers in the proscribed area the service and advice they are justly entitled to."

In paragraph 8 of the complaint the complainant requests that Item 10 (c) of the respondent's Tariff No. 14 be set aside and annulled and that it be suspended pending the issuance of a decision and order to such effect.

The respondent filed an answer to the complaint admitting the issuance of Item 10 (c), admitting that the complainant operates as a market agency in the respondent's stockyard, and stating upon information and belief that the complainant or related organizations have been engaged in buying and selling livestock in the country surrounding the respondent's stockyard but demanding strict proof thereof. The answer denies the allegations in paragraph 3 concerning lack of authority to issue Item 10 (c), denies the allegations in paragraph 4 and alleges that it is required to furnish stockyard services only to those persons and organizations complying with reasonable regulations of the respondent, denies the allegations in paragraph 5 to the effect that Item 10 (c) is unjust, unreasonable or discriminatory, denies that paragraph 6 of the complaint contains a "completely correct interpretation" of Item 10 (c) as applied to the situations described therein and calls for proof of the nature and operation of the complainant's business described in paragraphs 7 and 8, and denies that Item 10 (c) has the effect alleged in the last sentence of paragraph 7.

The answer, in addition, contains affirmative defenses to the effect that the issuance of Item 10(c) was necessary:

(1) To enable the respondent and the market agencies [fol. 9] operating at respondent's stockyard to furnish, and to enable the patrons of the stockyard to receive, upon reasonable request, without discrimination, reasonable stockyard services at the stockyard since such would not be the case as long as certain market agencies and dealers operating at the stockyard engage in operations away from

the stockyard which make it impossible for them to carry out their primary duties and responsibilities at the respondent's stockyard.

(2) In order that the respondent might carry out its statutory duty to establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices with respect to the furnishing of stockyard services at its stockyard since, in the absence of Item 10 (c), certain market agencies and dealers operating at the respondent's stockyard would engage also in activities elsewhere making it impossible for them to carry out their primary duties and responsibilities at the respondent's stockyard.

(3) In order to eliminate unjust, unreasonable and discriminatory practices followed by market agencies and dealers operating at the respondent's stockyard resulting from their activities in the area in Colorado contiguous to the stockyard which rendered it impossible for such market agencies and dealers to perform their duties and responsibilities at the respondent's stockyard.

(4) In order to prevent market agencies and dealers operating at the respondent's stockyard from engaging in a practice with respect to livestock in the area contiguous to the respondent's stockyard, described in Item 10 (c), which created an undue, unreasonable and unlawful advantage, prejudice and preference as between persons and localities in intrastate commerce in livestock and interstate commerce in livestock and an undue, unjust, unreasonable and unlawful discrimination against interstate commerce in livestock resulting from the diversion of livestock from the respondent's stockyard, the consequent fluctuation in prices of livestock handled in interstate commerce at such stockyard and the failure of some market agencies and dealers operating at the respondent's stockyard to carry out their duty to render reasonable stockyard services at the respondent's stockyard and to establish and observe [fol. 10] just, reasonable and nondiscriminatory practices at such stockyard with respect to the furnishing of stockyard services.

The answer asks for oral hearing and contends that there is no authority in the act to suspend Item 10 (c) since it is

not a new regulation or practice affecting any rate or charge.

Subsequent to the answer, respondent filed a motion with an accompanying affidavit for an order requiring the complainant to produce specified books and records for examination and copying. The motion recited that the books and records requested were competent, relevant and material to the issues raised in the proceeding. The complainant filed a reply to the motion stating as its sole ground for opposition that Item 10 (c) in invalid as a matter of law because (1) the issuance of Item 10 (c) is not authorized by the act, (2) Item 10 (c) is illegal and invalid on its face because it restrains trade, divides the territory in which market agencies and dealers at the respondent's stockyard may operate between areas in which they may operate and areas in which they may not operate except in connection with the respondent's stockyard and because it reduces competition for the livestock of farmers and ranchmen in the proscribed area who may wish to sell their livestock direct without having it go through a stockyard and denies market agencies and dealers at the respondent's stockyard the right to do business in the proscribed area unless done with respect to the respondent's stockyard, and (3) Item 10 (c) on its face is unjust and unreasonable.

The respondent filed a motion to strike the complainant's reply as not responsive to respondent's motion to examine.

Oral argument was held before Jack W. Bain, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture, at Washington, D. C., on October 21, 1955. The respondent at that time submitted an additional affidavit in support of its motion to examine. Briefs were filed by the parties. On December 6, 1955, the hearing examiner issued an interim ruling in which he held that the contested regulation was not invalid on its face and he set the matter down for hearing at Denver, Colorado, on [fol. 11] January 24, 1956. The hearing examiner also indicated that he would grant respondent's motion if examination of the complainant's books and records was necessary after complainant presented its case. On December 23, 1955, complainant in a document entitled, "Complainant's Election to Rest," waived oral hearing and submitted the matter

for final determination on the contention that the disputed regulation was illegal on its face as a matter of law. Respondent then filed a motion to dismiss the complaint with prejudice because of the complainant's failure to prosecute the proceeding by making out a prima facie case. On December 28, 1955, the hearing examiner certified the proceeding to the Judicial Officer for decision, pursuant to section 202.10 (b) of the rules of practice (9 CFR 202.10 (b)) with a recommendation that it be dismissed. Complainant filed exceptions to the hearing examiner's recommendation and requested oral argument and the right to submit briefs.

Motions were filed by the Oklahoma Live Stock Marketing Association, the National Live Stock Commission Company, the National Feeder Service Corporation, the National Live Stock Producers Association, and the American Farm Bureau Federation for leave to file briefs and amici curiae and Charles B. Heinemann, Jr., filed a motion for leave to file a brief amicus curiae and to participate in the oral argument. On February 24, 1956, the applications or motions were granted, and the briefs to be filed were limited to the question of whether the contested regulation is invalid on its face. The request of Charles B. Heinemann, Jr., to participate in the oral argument was denied. Earlier in the proceeding, the American Farm Bureau Federation had filed and subsequently withdrawn a motion for leave to intervene. The parties and the interested persons filed briefs and oral argument was held before the Judicial Officer on April 30, 1956.

Findings of Fact

1. The complainant, Producers Livestock Marketing Association, is a cooperative marketing association registered with the Secretary of Agriculture under the act as a market agency to buy and sell livestock on a commission basis at [fol. 12] the Denver Union Stockyards, Denver, Colorado, a stockyard posted as subject to the act, and at other posted stockyards.

2. The respondent, The Denver Union Stock Yard Company, is a corporation that owns and operates the Denver Union Stockyards, Denver, Colorado.

3. The Denver Union Stock Yard Company on May 11, 1955, issued its Tariff No. 14, effective May 25, 1955, containing its schedule of rates and charges for stockyard services rendered by it and its rules and regulations, including Item 10 (c) which reads, in part, as follows:

> "No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—
>
> "(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or
>
> "(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock yard; or
>
> "(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.
>
> "The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the state of Colorado except that part listed as follows: * * *
>
> "The provisions of paragraph (c), do not apply on livestock solely used for breeding purposes."

4. The act provides, in part, as follows:

> "Sec. 2. (a) * * * (6) The term 'commerce' means commerce between any State, Territory, or possession, [fol. 13] or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. (b) For the purpose of this Act (but not in anywise limiting the foregoing definition) a transaction in respect to any article shall be considered to be in commerce if such article in part of that current of commerce usual in the livestock and meat-packing industries, whereby livestock, meats, meat food products,

livestock products, dairy products, poultry, poultry products, or eggs are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through report being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word 'State' includes Territory, the District of Columbia, possession of the United States, and foreign nation. * * *

"Sec. 301. When used in this Act--

"(a) The term 'stockyard owner' means any person engaged in the business of conducting or operating a stockyard;

"(b) The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, *in commerce*, of livestock;

"(c) The term 'market agency' means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

"(d) The term 'dealer' means any person, not a market agency, engaged in the business of buying or selling *in commerce* livestock at a stockyard, either on [fol. 14] his own account livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser. [Emphasis supplied.]

"Sec. 302. (a) When used in this title the term 'stockyard' means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appur-

tenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held or kept for sale or shipment *in commerce*. * * * [Emphasis supplied.] * * *

"Sec. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: * * *

"Sec. 306. * * * (e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary . . . may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; * * *

"Sec. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful. * * *

"Sec. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the [fol. 15] just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed.

"Sec. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, *not in commerce*, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden, and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." [Emphasis supplied.]

Conclusions

I. The respondent's motion to dismiss with prejudice for failure of the complainant to sustain the burden of [fol. 16] making a prima facie case in support of its complaint is based upon the complainant's election not to ad-

duce evidence at a hearing following the hearing examiner's ruling that the disputed regulation was not invalid on its face and that a hearing upon the facts was necessary. Of course such a motion would be granted if such a ruling were made by a judge in a United States District Court and a complainant thereafter failed to present evidence. But here the ruling was made by a hearing examiner and, under our practice, rulings of hearing examiners are recommendatory only and subject to review by the Judicial Officer. The complainant was free to waive hearing and to stake the outcome of the proceeding solely upon the question as to whether the disputed regulation is invalid on its face as a matter of law. Although no formal motion for judgment was filed by the complainant, it accomplished the same thing by requesting a ruling in its favor. Accordingly, the motion to dismiss for failure to make a prima facie case is denied insofar as it seeks dismissal without final adjudication of the issues of law made by the complainant.

We have, then, a situation in which there has been no hearing upon the facts and for that reason somewhat detailed descriptions of the complaint and answer have been given in the Preliminary Statement above. From these descriptions it is seen that the respondent denies that the complainant has given a completely accurate account in the complaint of the effects of Item 10 (c), demands proof of the nature of the complainant's business, and sets up four affirmative defenses. Such is the nature of the record upon which the arguments as to the invalidity of Item 10 (c) must be evaluated. Consequently, we have for decision not the question as to whether Item 10 (c) is valid or invalid but only the question as to whether Item 10 (c) is *invalid on its face*.

II. The complainant first contends that the regulation is invalid on its face because stockyard owners can issue only such regulations as are authorized by the act, that the act authorizes the issuance only of regulations in respect to the furnishing of stockyard services or those which affect rates or charges and that Item 10 (c) is not such a regulation.

The major premise of the complainant's syllogism is de-
[fol. 17] fective. Stockyard owners are not required to find the source of their authority to issue rules or regulations governing the use of their property in the provisions of the act. Public utilities generally have always had the power at common law to issue such rules or regulations. 73 C.J.S., Public Utilities § 6; Am. Jur., Public Utilities and Services § 38. Of course, the rules or regulations must pass the legal tests of reasonableness, etc., but on this part of the complainant's case the issue is only as to whether the respondent can issue *any* rules or regulations not specifically authorized by the act and not whether a rule or a regulation issued is invalid. We are addressing ourselves at this point then *only to the question as to whether the authority to issue rules or regulations by a stockyard owner must be found in the act.*

The regulatory scheme established in the act does not preempt the entire scope of a stockyard company's activities, but is limited in its operation to the supervision of the major function of stockyards, that is, the furn[illegible]g of stockyard services and the assessment of charge[illegible] such services. Title III of the act, and sections 304, 305 and 307 in particular (7 U.S.C. 205, 206 and 208), places an affirmative duty upon stockyard owners in connection with rates and charges and the furnishing of stockyard services and declares certain practices with respect thereto to be unlawful. The statute is silent, however, as to stockyard activities which do not constitute the furnishing of such services or the assessment of rates or charges with respect thereto, and the legislative history of the act failed to disclose any intent to regulate such activities.[3] Stockyards engage in numerous activities which are not "stockyard
[fol. 18] services." Properties such as straw barns used

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[3] See, e.g., H.R. Rep. No. 77, 67th Cong., 1st Sess. (1921); Sen. Rep. No. 96, 67th Cong., 1st Sess. (1921); Sen. Doc. No. 59, 67th Cong., 1st Sess. (1921); H.R. Rep. No. 324, 67th Cong., 1st Sess. (1921); Hearings before Committee on Agriculture on H.R. 14, 232, 5034 and 5692, 67th Cong., 1st Sess. (1921); 61 Cong. Rec. 1799-1817, 1860-1882, 1885-1890, 1913-1932, 2035-2036, 2257, 2319-2325, 2377-2392, 2486-2500, 2553-2554, 2560-2571, 2697-2713, 4529, 4642-4644, and 4778-4787 (1921).

for storing straw for bedding railroad cars, manure barns, and wash racks for cleaning and washing trucks are not considered to be used and useful for rate purposes. See *In re St. Louis National Stockyards Company*, 2 A.D. 664, 673-675 (1943). The activities generally conducted on such properties do not constitute stockyard services as that term is defined in the act and it cannot be said that the Congress was attempting to regulate such activities when it enacted the Packers and Stockyards Act, 1921, as amended. "Congress had no intention of regulating the entire business of the livestock and meat industry." *De Vries* v. *Sig Ellingson & Co.*, 110 F. Supp. 781 (D. Minn. 1951), *aff'd*, 199 F.2d 677 (8th Cir. 1952), *cert. denied*, 344 U.S. 934 (1953). The Secretary would have no jurisdiction over the activities conducted on such stockyard company property unless, of course, some relation to stockyard services and rates and charges was found. As in similar *regulatory* statutes, the scope of the jurisdiction conferred upon the regulatory authority, the Secretary in this case, over the industry to be regulated is limited to the jurisdiction conferred in the enabling statute. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); *Pennsylvania Railroad Co.* v. *Public Utilities Commission of Ohio*, 298 U.S. 170 (1936); *United States* v. *Pennsylvania Railroad Co.*, 242 U.S. 208 (1916); *Southwestern Bell Telephone Co.* v. *United States*, 45 F. Supp. 403 (W.D. Mo. 1942).

Even as to the matters under the Secretary's jurisdiction, the right to conduct the business of a stockyard remains in the stockyard company just as it did before the enactment of the statute *subject to the powers of inquiry and control given the Secretary by the act. Farmers Union Livestock Ass'n* v. *Saint Paul Union Stockyards Co.*, 97 F. Supp. 539 (D. Mont. 1951); *Acker* v. *United States*, 12 F. Supp. 776 (N.D. Ill. 1935), aff'd, 298 U.S. 426 (1936); *Holland Houfburg* v. *Kansas City Stock Yards Company of Maine*, 283 S.W. 2d 539 (Mo. 1955).

In any event, the minor premise of the complainant's syllogism is erroneous. The complainant claims that the disputed regulation bars market agencies and dealers at the respondent's stockyard from doing business off the

stockyard in the proscribed area and that, consequently, [fol. 19] the regulation is not one in respect to the furnishing of stockyard services at the respondent's stockyard. The regulation cannot be viewed properly in such isolation. It must be read in connection with the rest of the respondent's tariff and regulations and clearly Item 10 (c) attaches conditions or limitations upon the furnishing of stockyard services by the respondent at its stockyard. Outright refusal to furnish any stockyard services to a market agency has been held to be within the jurisdiction of the Secretary under the act as a matter in respect to the furnishing of stockyard services at a stockyard. *Sioux City Stockyards Co.* v. *United States*, 49 F. Supp. 801 (N.D. Iowa 1943); *Purcell* v. *The Union Stock Yard & Transit Company of Chicago*, 13 A.D. 365 (1954); *Alfred L. Dougherty* v. *The Union Stock Yard & Transit Company of Chicago*, 13 A.D. 239 (1954); *Flynn* v. *Kansas City Stock Yards Co.*, 12 A.D. 14 (1953). Certainly a regulation which places limitations upon the continued rendering of stockyard services is one in respect to the furnishing of stockyard services.

It is concluded, then, that the complainant has not shown that Item 10 (c) is invalid on its face for lack of authority or power for its issuance. If we agreed with the complainant that the regulation is not one in respect to the furnishing of stockyard services by the respondent, we would have to dismiss the complaint as being outside the Secretary's jurisdiction since, as we have noted above, the act confers control by the Secretary only over rates and charges and the furnishing of stockyard services.

III. The complainant argues also that the respondent's Item 10 (c) is illegal on its face because it violates section 311 of the act quoted above in Finding of Fact 4. Section 311 came into the case initially because the fourth affirmative defense in the respondent's answer alleges that the issuance of Item 10 (c) was necessary to prevent market agencies and dealers operating at the respondent's stockyard from engaging in a practice with respect to livestock in the area specified in Item 10 (c) which created an undue, unreasonable and unlawful advantage, prejudice and preference as between persons and localities in intrastate com-

merce in livestock and interstate commerce in livestock and an undue, unjust, unreasonable and unlawful discrimination against interstate commerce in livestock by reason [fol. 20] of diversion of livestock from the respondent's stockyard, etc.

In argument subsequent to the filing of the respondent's answer, the complainant sees in section 311 a statutory right to engage in business in the country, that is, off the respondent's stockyard, and claims that only the Secretary of Agriculture can take action pursuant to section 311 and that since the respondent has issued Item 10 (c) the respondent has thereby precluded the Secretary from ever being able to invoke section 311 with respect to activities in the area designated in Item 10 (c) on the part of market agencies and dealers at the respondent's stockyard and that for these reasons Item 10 (c) is illegal.

The Complainant and the respondent share the view that the language in section 311 " . . . rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission, receiving . . . *not in commerce* of livestock . . . " [Emphasis supplied.] refers to country operations, that is, activities off a posted stockyard. Assuming this view to be correct, which we doubt, we do not see how Item 10 (c) can be held to be in violation or conflict with section 311 so construed in the absence of a hearing upon the facts.

Whatever rights market agencies at stockyards have to operate in the country, they do not derive them from Title III of the act. Title III is a statutory regulation superimposed upon the conduct of stockyard owners, market agencies and dealers and not a grant of substantive powers to those regulated. And the complainant's contentions as to Item 10 (c) conflicting with section 311 are based upon one of four affirmative but unproved defenses of the respondent in its answer, a defense which omits the basic jurisdictional requisite of section 311, namely, that the practice aimed at by Item 10 (c) is a practice of a stockyard owner or market agency "not in commerce" which creates unlawful advantage between persons or localities in intrastate commerce and interstate or foreign commerce in live-

stock or unlawfully discriminates against interstate commerce in livestock.

Assuming, however, that this affirmative defense attempts to justify Item 10 (c) under section 311, there is no sup- [fol. 21] porting evidence to this effect in the proceeding and if this affirmative defense were to be taken as true for the purposes of final decision herein on the theory that the complainant has in effect demurred to the respondent's answer or has asked for judgment on the pleadings, the other three affirmative defenses in the answer alleging necessity for the issuance of the regulation to carry out the respondent's statutory obligations would also have to be taken as true. But of course the allegations being conclusions are not to be taken as true and remain unproved. *Cacek* v. *Munson*, 160 Neb. 187, 69 N.W. 2d 692 (1955). As is seen from section 311, it is rates, charges, practices, etc., "not in commerce" that provide the jurisdictional basis for the application of section 311 and the respondent would have considerable difficulty in proving its allegation since it is evident that many if not most of the transactions which would be reached by the respondent's Item 10 (c) would be just as much "in commerce" as transactions at the respondent's stockyard in view of the broad definition of "in commerce" contained in section 2 of the act.

In addition, as we have said above, we doubt that the parties are correct in their construction of section 311. We are unaware of any administrative interpretation of the act during its 35 years of existence that places upon section 311 the meaning advanced by the parties and we do not believe that the internal construction of the act supports such meaning. Title III of the act carefully defines "stockyard" in section 302 (a) as a place in which livestock is handled "*in commerce*," it defines "market agency" as a person in a specified business *in commerce* at a *stockyard* and proceeds to authorize control by the Secretary of Agriculture over stockyard services, rates, charges, practices, etc., that by definition or otherwise are limited to activities in commerce at a stockyard which by definition is itself a place handling livestock *in commerce*. Except for section 311, the regulatory authority given the Secretary is over transactions *in commerce* at a *stockyard*.

In describing the coverage of section 311 as to things "not in commerce," the same language is used as in the definition of "stockyard services." Such latter term could not be used because it is defined to mean such services *in commerce* at stockyards and the employment of the same language in section 311 as in the definition of "stockyard services" tends to show that what was meant were services at a [fol. 22] stockyard that are "not in commerce."

Resort to the legislative history of the act shows that the Congress in enacting the statute was very concerned (see e.g., H.Rep. No. 77, 67th Cong., 1st Sess. (1921) about the constitutionality of regulating affairs at a stockyard because of former decisions of the Supreme Court to the effect that such affairs were local and intrastate. *Hopkins* v. *United States*, 171 U.S. 578 (1898); *Anderson* v. *United States*, 171 U.S. 604 (1898). In view of the careful delimiting of the Secretary's powers in all provisions of Title III except section 311 to matters at a *stockyard* that are *in commerce*, section 311 appears to have been utilized to cover situations in which some matters at a stockyard might be considered by the courts as being "not in commerce."[4]

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[4] See e.g., the letter from the Secretary of Agriculture contained in the Hearings before the House Agriculture Committee on Meat Packer Legislation, January 3, 1921, p. 26, incorporated into the House Committee Hearings (p. 276) of May 1921 on H.R. 14, H.R. 232, H.R. 5034 and H.R. 5692, which reads in part as follows (p. 27): "It appears that the bill has been very carefully drafted with the constitutional limitations upon the Federal Government clearly in mind. The definition of commerce in the second paragraph of the bill is somewhat broader than that usually found in the statutes, and there may be a question as to its constitutionality.

"It was probably drafted with the decision of the Supreme Court in Texas Co. v. Sabine Tram Co. (227 U.S. 111), and similar decisions in mind; and in view of those decisions there may be various states of facts and circumstances to which its application will be held to be within the power of the Federal Government. You are no doubt familiar with the decisions of the Supreme Court in Hopkins v. United States (171 U.S. 578), and Anderson v. United States (171 U.S. 604). The Hopkins case is cited with approval in Blumenstock Bros. v. Curtis Publishing Co. (252 U.S. 436), in which the court said: 'We held, in Hopkins v. United States (171 U.S. 579), that the buying and selling of live stock in the stockyards of a city by members of the stock exchange was not interstate

It is true of course that *Stafford* v. *Wallace*, 258 U.S. 495 (1922), has been regarded as having the effect of holding that every transaction at posted stockyards, at [fol. 23] least the major ones, is in interstate commerce. The parties argue that because of the Court's opinion in that case, the "not in commerce" provisions of section 311 must relate to transactions outside the stockyard. The answer to this is simply that if *Stafford* v. *Wallace* so holds, it has turned out that it was needless for Congress to have worried about the constitutionality of Title III and it was unnecessary to have enacted section 311 and to have included the words "in commerce" anywhere in Title III except in the definitions of the persons subject to jurisdic-[fol. 24] tion. It does not follow that if Congress had been legally overcautious in framing the act, the surplusage should find a new and different meaning than intended.

Pertinent also to our inquiry here is the legislative setting for section 311 which indicates strongly that the section may extend only to conflict between state and Federal regulations and primarily to the overruling by the Secre-

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commerce, although much of the live stock was sent from other States (p. 443).'

"If the court adheres to these decisions, the bill, in so far as it affects the stockyards and the commission men, would seem to be limited to what are purely interstate transactions which would probably constitute a small part of the business in view of those decisions. But if there is even a small part of the business with respect to which the Federal Government could control the rates, charges, and practices, the commission men and stockyards operators would probably, for practical reasons, not enforce different rates, charges, and practices as to intrastate business, so that control of the purely interstate business would tend to regulate the whole business. This is probably what the framers of the bill had in mind.

"Section 311 of the bill proposes to give the Interstate Commerce Commission jurisdiction over intrastate business in live stock when this is necessary to prevent discrimination against interstate or foreign commerce in that business. This is no doubt based upon the decision of the Supreme Court in the Shreveport Rate case (234 U.S. 342). It seems doubtful whether the live-stock business is of such a character that such discrimination could be effected, but the provision should prove helpful in case of such discrimination."

tary of rates or charges fixed by state authority.[5] The practice claimed by the respondent as aimed at by Item 10 (c) does not appear to be a practice imposed or required by any state authority. So that whether or not section 311 covers off-the-stockyard transactions, Item 10 (c) still would probably not conflict with section 311.

IV. We proceed next to consideration of issues raised by the complainant and the *amici* that are based upon the nature of the respondent's business, that is, a public service or public utility business. They claim that Item 10 (c) forces the complainant and all in its position to market livestock from the designated area through respondent's stockyard or not at all and that this violates all basic legal concepts applicable to public utilities. They contend that Item 10 (c) on its face violates the act and is unlawful [fol. 25] generally because it is unfair, unreasonable, discriminatory, contrary to public policy as in restraint of trade, etc. The complainant and the *amici* cite cases such as *Coombs* v. *Burk*, 180 P. 59, 40 Cal. App. 102 (1919), *State* v. *Citizens Tele. Co.*, 39 S.E. 257, 61 S.C. 83 (1901), and *People* v. *Public Service Commission*, 148 N.Y. 583 (1914), condemning exclusive patronage requirements by utilities through contracts or practices. They also cite cases such as *Garner* v. *City of Aurora*, 30 N.W. 2d 917, 149 Neb. 295 (1948), and *Ten Brock et al.* v. *Miller et al.*, 216 N.W. 385, 240 Mich. 667 (1927), illustrating the rule that a utility may not refuse its utility service because of some matter

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[5] Chairman Haugen of the House Agriculture Committee explained section 311 of his bill H.R. 14 (later substantially enacted as the statute), which is the same as section 311 of the act, as follows (Hearings on H.R. 14, H.R. 232, H.R. 5034 and H.R. 5692, May 1921, p. 10): "Section 311 is modeled after section 13 of the Interstate Commerce Act in respect to conflict between State and Federal regulations." The debate on the floor of the House about section 311 revolved around the lawfulness and wisdom of supplanting Federal regulation of intrastate activities at stockyards for state regulation of such activities. 61 Cong. Rec. 1813, 1868-1869, 1928-1930 (1921). Section 311 was *copies* from par. 4, section 13, of the Interstate Commerce Act as amended by section 416 of the Transportation Act of 1920 (41 Stat. 484, 49 U.S. 13 (1940), which authorized the Interstate Commerce Commission to fix rates for intrastate transportation on interstate carriers or systems superseding rates fixed by state railroad commissions.

collateral to the utility function such as the termination of water service because of failure to pay a garbage collection bill. The complainant cites *South Florida R. Co.* v. *Rhoads*, 5 So. 633, 25 Fla. 40 (1889), in which it was held that the reasonableness of a carrier's regulation was a question of law for the court and that a railway could not refuse to transport a passenger wearing a cap of a steamship line competing with steamship lines which had an agreement with the railway.

The cases cited to illustrate the illegality of exclusive patronage requirements by utilities through contracts or practices are expressions of public policy by the various state courts and generally involve utilities franchised as monopolies by municipalities or similar political subdivi-s-ons and in many of the cases the utility's right to use public property such as streets and highways, the power of eminent domain, or other rights of a similar public nature were important considerations in the court decisions and provide the basis for the public policy that even a partial restraint of trade by such utilities may be bad. Nevertheless even in the field of traditional public utilities there is much authority to the effect that a utility is not required to serve competitors who resell the service (e.g., *People* v. *Public Service Corporation*, 181 N.Y. 259 (1920), distinguishing *People* v. *Public Service Corporation*, *supra*; *Florida Power and Light Co.* v. *State*, 144 So. 657, 107 Fla. 317 (1932); *Rogers Iron Works* v. *Joplin Waterworks Co.*, 18 S.W. 2d 420, 323 Mo. 122 (1929)). Similarly, a utility has not been compelled to give its property to the use and benefit of a rival as a member of the general public to be served (*Evansville & H.R.* v. *Henderson B. Co.*, 134 [fol. 26] Fed. 973 (1904) and it has also been ruled that "unjust discrimination" does not forbid just discriminations that are incident to the protection of organic rights (*State* v. *Jacksonville Terminal Co.*, 106 So. 576, 90 Fla. 721 (1925)).

None of the cases cited by the complainant and the *amici* had the posture of our proceeding, namely, a record consisting only of a complaint and an answer which denies that the complaint accurately describes the effects of the disputed regulation, denies the legal conclusions of the complaint and sets up affirmative defenses which allege

that the regulation is necessary in order the the respondent may carry out its statutory duties.

It is generally the case that whether or not there is unjust discrimination by a utility depends upon the surrounding circumstances. Am. Jur., Public Utilities § 42. The question is one of fact, *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 481 (1918), and it is only when the facts are ascertained that the question of unreasonableness is for the court. 13 C.J.S., Carriers § 352. "In determining the reasonableness and validity of [a utility's] rules and regulations it is obvious that each case must depend largely upon the circumstances involved." 30 L.R.A. (N.S.) 493. The reasonableness of a regulation issued by a carrier subject to the Interstate Commerce Commission must be determined by preliminary resort to the Interstate Commerce Commission because the inquiry is essentially one of fact and of discretion in technical matters and uniformity can be secured only if determination is left to the Commission. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *Hewitt* v. *New York, N.H. & H.R. Co.*, 29 N.E. 641, 284 N.Y. 117 (1940).[6] In at least one case, *Platt* v. *Lecocq*, 158 Fed. 723 (8th Cir. 1907), it has been said that a carrier's regulations are presumptively reasonable and that the ". . . burden is on him who assails them to prove that they are unfair and unjust, and it is only when it clearly appears by competent evidence that they are unreasonable that commissions or courts may lawfully interfere to annul or to change them." Con- [fol. 27] cerning exclusive patronage contracts by public utilities, *Harding Glass Co.* v. *Twin City Pipe Line Co.*, 39 F.2d 408 (8th Cir. 1930), which goes into the problem thoroughly, states at p. 412, "A dominant question to be considered in each case is whether the contract involved is injurious to the public interest, *and each case must be judged by its own circumstances.*" [Emphasis supplied.]

It is generally the case, then, that the reasonableness of a utility's regulation necessarily involves factual inquiry

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[6] Under these cases there need to be no preliminary resort to the Interstate Commerce Commission on pure questions of law and there would likewise be no need for preliminary resort to the Secretary on the case here as made by the complainant.

and this is true whether unjust discrimination is regarded separately or as bound up in the question of reasonableness.

In *South Florida R. Co.* v. *Rhoads*, *supra*, the entire question of reasonableness was left to the jury. This was held to be error and the question of reasonableness was decided to be one for the court because if left to juries different juries might reach different results with respect to the same regulation. Such a rationale no longer has vitality with respect to regulations by carriers subject to the Interstate Commerce Commission in view of the necessary preliminary resort to the Interstate Commerce Commission and, of course, the reasonableness of stockyard company regulations must first be adjudicated by the Secretary before resort to court for the same reasons. It is to be observed, too, that in the *South Florida R. Co.* case heavily relied upon by the complainant, the court held also that the question of whether there was a bona fide agreement by the carrier with steamship lines, that is, one not entered into for the purpose of an oppressive monopoly, was a mixed question of law and fact properly left to the jury to decide.

The complainant's use of the doctrine that a utility cannot refuse its utility service for collateral reasons misses the mark because the complainant presents an imperfect analogy. In the light of the respondent's answer, we cannot say on this record that Item 10 (c) is unconnected with the furnishing of stockyard services at the respondent's stockyard and that there is no more relation between Item 10 (c) and the furnishing of stockyard services by the respondent than there is between payment for garbage collection and the furnishing of water or between payment for electrical appliances sold by a utility and the utility's [fol. 28] service of providing power.

A stockyard company is no doubt a public service company. But the applicability of the cases dealing with franchised monopolies cited by the complainant and the *amici* or the cases cited where the utility was not required to provide service depends upon the nature of the services offered by the respondent, the relationship of the market agencies and dealers to the stockyard, the effects of the contested regulation, and other relevant and material facts which are not before us. For example, the regulation in

part prohibits conduct on the stockyard company's property that diverts livestock in the designated area from the respondent's stockyard. The complainant and the *amici* would have us rule without hearing the facts that it is illegal on its face for the respondent to prohibit the use of its facilities and services for the carrying on of business in competition with the respondent. In other words, we conclude that unreasonableness, illegal discrimination, contrariety to public policy as in restraint of trade, etc., with respect to Item 10 (c) cannot be determined on the present record and that the general rule applies, namely, that the issues made in this respect can be decided only after the relevant and material facts are ascertained. We are not prepared to say that nothing in the respondent's answer has a material bearing on the outcome of the proceeding.

V. Lastly, complainant contends that Item 10 (c) of respondent's tariff is an invalid restraint of trade in violation of Federal antitrust laws[7] because it denies "to the

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[7] Section 1 of the Sherman Act (15 U.S.C. 1) provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ." Section 2 of the Sherman Act (15 U.S.C. 2) reads: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ." Section 3 of the Clayton Act (15 U.S.C. 14) is as follows: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[fol. 29] market agencies and dealers operating at the stockyard of Respondent the right to do any business in livestock in the proscribed area except the animals go through that stockyard, denies them that freedom of action and of contract that our anti-trust laws were enacted to assure; and likewise denies to the farmers, ranchmen and other sellers of livestock in the proscribed area the right to sell their livestock to or through such market agencies and dealers without having their livestock go through the stockyard of Respondent." It is argued by the respondent, on the other hand, that the validity of the contested regulation is not to be decided under the Federal antitrust laws but in the light of the meaning and objectives of the Packers and Stockyards Act, 1921, as amended, citing *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953).

Complainant relies, in part, upon the pronouncements of the Supreme Court in *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), and *Standard Oil Company of California* v. *United States*, 337 U.S. 293 (1949), to establish that Item 10 (c) is violative of the Federal antitrust laws. The *International Salt* case involved the validity under section 1 of the Sherman Act and section 3 of the Clayton Act of a contract tying the sale of a non-patented to a patented product, and the *Standard Oil* case dealt with the validity of requirements *contracts* under section 3 of the Clayton Act. Aside from the questions of whether respondent's regulation may properly be categorized as a "tying" arrangement or a requirements contract or whether [fol. 30] section 3 of the Clayton Act properly applies,* these two cases cited by complainant do not lead us to the result desired on the basis of the record before us. For a violation of section 3 of the Clayton Act it is necessary to establish that the lease, sale or contract for sale meeting the requirements set forth in that section would probably

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* Section 3 of the Clayton Act would not appear to be applicable to the facts of this case as, among other reasons, it is doubtful whether stockyard services constitute "goods, wares, merchandise, machinery, supplies, or other commodities" under such section. United States v. Investors Diversified Services, 102 F. Supp. 645 (D. Minn. 1951).

lessen competition or tend to create a monopoly in a line of commerce. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922); *Pick Manufacturing Co.* v. *General Motors Corp.*, 299 U.S. 3 (1936). Under section 1 of the Sherman Act, it has long been held that the reasonableness or unreasonableness of the restraint is an element to be considered. *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1 (1911). *Both of these tests or considerations are questions of fact, the solution of which rests upon the conditions obtaining in each particular case.* *United States* v. *Standard Oil Co. of California*, 78 F. Supp. 850 (S.D.Cal. 1948) (*affirmed*, 337 U.S. 293 (1949), *supra*). While in the *International Salt* case the Court held on a motion for summary judgment that the admitted facts left no genuine issue for trial as it is unreasonable, *per se*, to *foreclose competitors* from any *substantial* market, the pleadings or admissions of fact were sufficient to enable the Court to conclude that the volume of business affected by the "tying" contracts involved therein "cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious." *International Salt Co.* v. *United States*, *supra*, at page 396. The Court there had before it the number of patent license agreements involved, the amount of salt sold by the patentee for use in the patented machines and the monetary value of such salt. In this proceeding, no comparable information is before us. Monopolistic position in the market for the "tying" product has not been established. See *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953). The record is lacking also in such information as the quantity, type, and nature of the livestock business conducted in the prescribed area, the competing elements of the livestock industry in such area, [fol. 31] the possible effect of respondent's regulation upon the competitive marketing organizations in the area in question, the general flow of livestock originating in the defined area, and other relevant matter. We cannot find on the basis of the facts before us that Item 10 (*c*) forecloses competitors from any substantial market; that the volume of business affected by the contested regulations is significant or substantial; and that the regulation neces-

sarily tends to the accomplishment of monopoly. In fact, on the basis of the record; it is not even possible to determine whether the alleged restraint of trade is a "restraint of trade or commerce *among the several States, or with foreign nations.*" [Emphasis supplied.] Although it is not thought that complainant would have difficulty establishing the applicability of section 1 of the Sherman Act to the commerce in livestock conducted in the designated area (*Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*; 334 U.S. 219 (1948); *United States* v. *Employing Lathers Association of Chicago and Vicinity*, 347 U.S. 198 (1954)), no evidence to that effect has been presented.

Nor does the *Standard Oil* case render any assistance to complainant. The Court there held that requirements contracts transgressed section 3 of the Clayton Act whenever they foreclosed competition in a substantial share of the line of commerce affected. The factual content for the rule of law expressed in the *Standard Oil* case is lacking in this proceeding. Moreover, subsequent decisions have retreated in the direction of requiring a greater degree of proof to establish a foreclosure of competition and a consequent violation of section 3 of the Clayton Act. See *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953). See also Report of the Attorney General's National Committee to Study the Antitrust Laws, pp. 137-149 (1955).

Complainant also cites *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952), dealing with exclusion of a competitor from facilities for the receiving and sale of fresh fruits and vegetables. Violation of the antitrust laws was found there because of monopoly power to deny a competitor access to the market. Complainant is not here alleging exclusion from the posted stockyard but, rather, a limitation [fol. 32] of its activities in the area defined in Item 10 (c). The evidence in this proceeding is not sufficient to enable us to determine the status of the complainant and respondent in the proscribed area, that is, the extent of competition, the degree of monopoly power of respondent, if any, at Denver or in the proscribed area or whether monopoly power, if possessed, has been used to foreclose competition,

to gain a competitive advantage or to destroy a competitor. See *United States* v. *Griffith*, 334 U.S. 100, 106-108 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 181 (1944). The problems posed by the alleged monopoly and restraint of trade in this proceeding are unique and before Item 10 (c) can be properly related to the anti-trust laws it is necessary that there be a great deal more in the way of a record then we have here.

We are not by this decision saying that Item 10 (c) of respondent's regulations is valid under the Federal anti-trust laws. We merely hold that the record is insufficient for a determination that Item 10 (c) violates such laws.

VI. To recapitulate, we conclude that upon the limited record before us we cannot find that the contested regulation of the respondent is invalid upon its face. This conclusion applies to the arguments made on behalf of dealers as well as those advanced by the complainant and the *amici* with respect to market agencies. Our ruling is strengthened by the fact that section 310 of the act requires that a "full hearing" precede a determination by the Secretary that a regulation of a stockyard company for or in connection with the furnishing of stockyard services is unjust, unreasonable, or discriminatory. A similar provision is contained in the Interstate Commerce Act (49 U.S.C. 15 (1)). In *Baltimore and O.R. Co.* v. *United States*, 277 U.S. 291, 299, 300 (1928), the Supreme Court said of a challenged carrier's regulation, "... the Commission would not be authorized to set it aside without evidence that it is unjust, or unreasonable."

Since the complainant has elected to waive hearing upon the facts and to have final determination made upon its proposition that Item 10 (c) is illegal upon its face [fol. 33] and we have concluded that we cannot agree with the complainant, the complaint should be dismissed. Under the circumstances, the dismissal has the same effect as if dismissal were ordered after a hearing upon the facts. We see no particular need, then, for mentioning in the order that the dismissal is with prejudice.

ORDER

The complaint herein is dismissed.

Copies hereof shall be served upon the parties.

Done at Washington, D. C., this 18th day of June, 1956.

Thomas J. Flavin (Signed), Judicial Officer.

Received June 19, 1956. The Hearing Clerk, Office of the Secretary, U. S. Department of Agriculture.

IN UNITED STATES COURT OF APPEALS

MOTION OF THE DENVER UNION STOCK YARD COMPANY TO APPEAR AS PARTY RESPONDENT—Filed August 16, 1956

To the Honorable, the Chief Judge and the Associate Judges of the United States Court of Appeals for the Tenth Circuit:

The Denver Union Stock Yard Company moves the Court for leave to appear as a party respondent in the above-entitled proceeding on the ground that it was the party in interest in the proceeding before the Judicial Officer of the Department of Agriculture, whose order the petitioner herein seeks to have reviewed, and, accordingly, is the party whose interest would be affected if the order sought to be reviewed is enjoined, set aside, suspended, or determined to be invalid, and, therefore, pursuant to Title V; U.S.C., Section 1038, may appear as a party to this proceeding, on its own motion and *and* of right, and be represented by counsel in this proceeding for review of such order.

[fol. 34] Winston S. Howard, Dawson, Nagel, Sherman & Howard.

Ashley Sellers, Cummings, Sellers, Reeves & Conner.

Filed August 16, 1956.

IN UNITED STATES COURT OF APPEALS

ORDER PERMITTING DENVER UNION STOCK YARD COMPANY TO APPEAR—August 17, 1956

Before Honorable Sam G. Bratton, Chief Judge.

On motion, it is ordered that Denver Union Stock Yard Company may appear as party respondent in this cause.

Transcript of Proceedings Before the Secretary of Agriculture

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United States of America, Department of Agriculture

September 17, 1956

Pursuant to Title 28, United States Code, Section 1733, I hereby certify:

1. That there are now in this Department the following described documents in the proceeding entitled "Producers Livestock Marketing Association, Complainant, v. Denver Union Stock Yard Company, Respondent," P. & S. Docket No. 2176, arising under the Packers and Stockyards Act, 1921, as amended (7 U.S.C., 1952 ed., secs. 181-231):

(1) Complaint, filed July 7, 1955

(2) Copy of letter, dated 7-5-55, serving complaint

(3) Letter, dated 7-6-55, that L. S. Hulbert is attorney for Producers Livestock Marketing Association, filed by complainant 7-8-55

(4) Respondent's answer to complaint (oral hearing requested), filed 7-29-55

[fol. 35] (5) Respondent's motion for order requiring complainant to produce specified books and records for examination and copying, filed 8-12-55

(6) Affidavit of L. M. Paxton, filed 8-12-55

(7) Complainant's reply to motion for order to require complainant to produce specified books and records for examination and copying, filed 3-24-55.

(8) Motion to strike complainant's reply to respondent's motion for order to require complainant to produce specified books and records

(9) Stay order, filed by Hearing Examiner 9-15-55

(10) Memorandum to Hearing Clerk transmitting statement of the Director of Livestock Division for filing in the record, filed 9-21-55

(11) Statement of Director of Livestock Division, filed 9-21-55

(12) Motion by American Farm Bureau Federation for leave to intervene, filed 9-21-55

(13) Respondent's opposition to motion by American Farm Bureau Federation for leave to intervene, filed 9-27-55

(14) Respondent's motion for order fixing time within which to file memoranda respecting motion by the American Farm Bureau Federation for leave to intervene, filed 9-27-55

(15) Notice to argument on motion, filed by Hearing Examiner 9-28-55

(16) Telegram that American Farm Bureau Federation withdraws motion to intervene, filed 10-3-55

(17) Notice of Oral Argument on Motion, filed by Hearing Examiner

(18) Affidavit of W. C. Crew, Vice President and General [fol. 36] Manager of Denver Union Stock Yard Company, filed 10-21-55

(19) Transcript of oral argument held before Hearing Examiner 10-26-55

(20) Brief for complainant, filed 11-3-55

(21) Copy of joint letter, filed 11-3-55, serving brief, and giving notice that reply brief due 11-18-55

(22) Respondent's brief, following oral argument of 10-21-55, filed 11-18-55

(23) Interim Ruling and notice setting hearing for 1-24-56, filed by Hearing Examiner 12-6-55

(24) Letter, dated 11-21-55, requesting two changes be made in brief filed 11-18-55, filed by respondent

(25) Exceptions of complainant to interim ruling and notice of hearing, filed 12-15-55

(26) Letter transmitting complainant's Election to Rest, filed 12-23-55

(27) Complainant's Election to Rest, filed 12-23-55

(28) Respondent's motion to dismiss, filed 12-27-55

(29) Certification to Judicial Officer for decision, with recommendation that proceeding be dismissed, filed by Hearing Examiner 12-28-55

(30) Respondent's memorandum in support of its motion to dismiss, filed 12-29-55

(31) Complainant's answer to motion to dismiss, filed 12-29-55

(32) Complainant's exceptions to recommendation of Hearing Examiner that proceeding be dismissed, and requesting oral argument before Judicial Officer, filed 12-29-55

[fol. 37] (33) Complainant's memorandum answering respondent's memorandum in support of its motion to dismiss, filed 1-3-56

(34) Copy of letter by Judicial Officer to parties' attorneys, prior to holding oral argument, setting time for filing briefs, filed 1-12-56

(35) Motion of Oklahoma Marketing Association, National Livestock Commission Company, and National Feeder Service Corporation, for leave to file amicus curiae brief, filed 1-16-56

(36) Motion of National Live Stock Producers Association to appear as amicus curiae and to file brief, filed 1-17-56

(37) Respondent's opposition to motion of Oklahoma Live Stock Marketing Association, National Live Stock Commission Company, and National Feeder Service Corporation for leave to file amicus curiae brief, filed 1-20-56

(38) Respondent's opposition to motion of National Live Stock Producers Association to appear as amicus curiae and file brief, filed 1-20-56

(39) Complainant's document favoring granting the motion of National Livestock Producers Association to appear as amicus curiae and filed brief, filed 1-30-56

(40) Complainant's document favoring granting the motion of Oklahoma Livestock Marketing Association, National Livestock Commission Company, and National Feeders Service Corporation for leave to file amicus curiae, filed 1-30-56

(41) Petition of American Farm Bureau Federation for leave to file brief as amicus curiae, filed 1-30-56

(42) Petition of Charles B. Heinemann, Jr., for permission to file briefs and participate in oral argument as an amicus curiae, filed 1-30-56

[fol. 38] (43) Respondent's opposition to petition of Charles B. Heinemann, Jr., for permission to file briefs and participate in oral argument as an amicus curiae, filed 1-30-56

(44) Respondent's opposition to petition by American Farm Bureau Federation for leave to file brief as Amicus curiae, filed 2-2-56

(45) Answer to respondent's opposition, filed by Charles B. Heinemann, Jr., 2-2-56

(46) Complainant's document favoring granting petitions to appear as amicus curiae by Charles B. Heinemann, Jr., and by American Farm Bureau Federation, filed 2-3-56

(47) Complainant's brief following certification of case to the Judicial Officer, filed 2-10-56

(48) Order allowing briefs amicus curiae, filed by Judicial Officer 2-24-56

(49) Copy of Judicial Officer's letter, dated 2-28-56, extending time for filing respondent's reply brief to 3-17-56, and giving complainant seven days after service of respondent's reply brief in which to file a brief in answer to respondent's reply brief

(50) Brief of National Livestock Producers Association as amicus curiae following certification of case to the Judicial Officer, filed 2-29-56

(51) Brief of American Farm Bureau Federation as amicus curiae following certification of case to Judicial Officer, filed 3-16-56

(52) Brief of amicus curiae, by Charles B. Heinemann, Jr., filed 3-16-56

(53) Respondent's reply brief to brief filed by complainant following certification of proceeding to the Judicial Officer, filed 3-16-56

[fol. 39] (54) Copy of letter, dated 3-16-56, to complainant's attorney serving respondent's reply brief.

(55) Brief of Oklahoma Live Stock Marketing Association, National Livestock Commission Company, and Na-

tional Federal Service Corporation as amicus curiae following certification of case to Judicial Officer, filed 3-19-56

(56) Complainant's reply brief to respondent's brief filed following certification to Judicial Officer, filed 3-26-56

(57) Order issued 3-27-56 by Judicial Officer, at request of respondent, that respondent may file briefs by 4-9-56 in answer to briefs amici curiae which have been filed.

(58) Respondent's reply to briefs of amici curiae, filed 4-9-56

(59) Letter, dated 4-16-56, requesting corrections be made in respondent's reply to briefs of amici curiae

(60) Copy of letter of 4-16-56, by Judicial Officer, notifying parties' attorneys that oral argument will be held on 4-30-56

(61) Transcript of oral argument held 4-30-56 before the Judicial Officer

(62) Copy of letter, dated 5-1-56, by the Judicial Officer giving 20 days after 5-1-56 to file briefs on *on* question as to whether section 311 of the Packers and Stockyards Act, 1921, has any application to transactions off a posted stockyard, that is to so-called "country" operations

(63) Complainant's brief relative to the question of whether section 311 of Packers and Stockyards Act, 1921, has any application to transactions off a posted stockyard, that is to so-called "country" operations, filed 5-21-56

(64) Respondent's brief concerning application of section 311 to the Packers and Stockyards Act, 1921, to so-[fol. 40] called "country" operations

(67) Decision and Order issued June 18, 1956, by Thomas J. Flavin, Judicial Officer

2. That a true and correct copy of the original of each of said documents is attached hereto.

(Seal) By direction of the Secretary of Agriculture, and in witness whereof, the said copies of said documents are hereby authenticated and the seal of the Department of Agriculture affixed hereto, and I have signed my name hereto on the day and year first above written.

(Seal) Thomas J. Flavin, Judicial Officer

BEFORE THE SECRETARY OF AGRICULTURE
COMPLAINT—Filed July 7, 1955

Hon. Ezra Taft Benson, Secretary of Agriculture, United States Department of Agriculture, Washington, D.C.

Dear Sir: Re: Complaint, Producers Livestock Marketing Association vs. Denver Union Stockyards Company. Denver Union Stockyard Company, a posted stockyard under the Packers & Stockyards Act and Regulations, issued May 11, 1955, effective May 25, 1955, its Tariff No. 14. In said Tariff No. 14 is the following:

"

Item 10.

"

Interference With Operations

" (a) ....

" (b) ....

" (c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at [fol. 41] outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

"The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the state of Colorado except that part listed as follows:

The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its inter-

section with U.S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes."

Producers Livestock Marketing Association is a market agency registered with the Secretary of Agriculture as required by the "Packers & Stockyards Act, 1921" and, as such, has operated for many years at said stockyards and at other stockyards also in the Western States; also, buying and selling at country points for livestock growers.

We respectfully submit that under the Packers & Stockyards Act of 1921 that the Denver Union Stockyard Company is authorized only to file a schedule with the Secretary of Agriculture stating "a new regulation or practice effecting any rate or charge"; and that it is authorized by that [fol. 42] Act only to establish "regulations and practices in respect to the furnishing of stockyard services"; and that regulation or practice purported to be prescribed or established by Item 10 (c) as aforesaid does not affect any rate or charge and does not relate to the furnishing of stockyard services and is therefore unauthorized and invalid.

Denver Union Stockyards is in fact a public utility under the Act, required to furnish reasonable service "without discrimination" and to "establish, observe and enforce just, reasonable and non-discriminatory regulations and practices . . . (and) every unjust, unreasonable or discriminatory practice is prohibited and declared to be unlawful". 7 U.S.C.A. § 205. § 208.

Without waiving the proposition stated above that the Denver Union Stockyard Company is entirely without authority under the Packers & Stockyards Act of 1921 to issue the regulation or to attempt to establish the practice herein objected to, we respectfully submit that subdivision (c) of Item 10 of Denver Union Stockyards Tariff No. 14 is unjust, unreasonable and discriminatory and should be set aside as unlawful. To our minds, there is no difference in law in this practice which purports to

deny market agencies and dealers the right to render services within the proscribed area unless the livestock in question is to be consigned to the Denver Union Stockyards, than of a railroad company which would deny freight service to a shipper who also shipped by truck; or an airline which denies passenger service to one who also travels by rail; or a public power company denying service to one who also uses gas; or a public water company denying culinary water to one who also receives water from an adjacent spring or purchases bottled water from another supplier; etc., etc. There is no difference, as we see it, between the examples noted and the one herein challenged.

Under this Regulation, commission firms and market agencies (including our Association) will be:

(a) Forbidden to handle livestock in the proscribed area direct to a packer, feeder or other outlet.

[fol. 43] (b) Forbidden to purchase in the proscribed area so as to meet competition and maintain volume for its outlets.

(c) Forbidden to furnish market advice to its members in the proscribed area except advice that they ship to and sell at the Denver Stockyards. (Our Association is a non-stock farmers' marketing cooperative having members only. The membership runs throughout the eleven Western States and elsewhere.)

(d) Forbidden in case of a glut of livestock at the Denver yards, or otherwise to re-consign shipments of livestock to other stockyards; e.g., Omaha, Chicago or elsewhere to the advantage of the grower.

Our business has been built up over a period of more than twenty years by successful service to the livestock growers themselves. Some members or growers sell outright, others consign to us in the country for direct movement, still others ship to central markets. Many telephone or write our Denver office to inquire about market conditions, about whether to ship to Denver, to the West Coast or to Eastern markets. This Regulation absolutely forbids in the proscribed area our buying, selling or taking consignments in the country except for movement to the Denver yards, and forbids in the proscribed area our furnishing the market advice or service above—except ad-

vice to the grower to ship to Denver Union Stockyards and no place else. It denies the growers in the proscribed area the service and advice they are justly entitled to.

We respectfully request:

1. That subdivision (c) of Item 10 of Denver Union Stockyards Company Tariff No. 14 be set aside and annulled.

2. That, meanwhile, the provisions of said subdivision (c) be suspended by the Secretary of Agriculture or proper authority thereunder until the order and decision of the Department upon said subdivision can be made.

[fol. 44] Respectfully,

Producers Livestock Marketing Association, By /s/ Lyman S. Hulbert, Its Attorney, 744 Jackson Place, N.W., Washington 6, D.C.

Received July 7, 1955. Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

FORMAL NOTICE OF FILING OF COMPLAINT—July 8, 1955

United States Department of Agriculture
Office of the Secretary
Washington 25, D. C.

Jul 8 1955

Registered Mail, Return Receipt Requested

Denver Union Stockyards Company, 100 Livestock Exchange Building, Denver 16, Colorado.

Mr. Ashley Sellers, Sellers & Conner, Attorneys at Law, 1625 Rye Street, N.W., Washington 6, D. C.

Gentlemen: Subject: Producers Livestock Marketing Association v. Denver Union Stockyards Company—P. & S. Docket No. 2176. Enclosed is a copy of a complaint under the Packers and Stockyards Act, 1921, as amended, which has been filed in behalf of Producers Livestock Marketing Association naming you as respondent.

In view of the nature of this complaint it has been decided that formal action will be instituted in accordance with section 202.6 (b) of the rules of practice governing proceedings under the act. A copy of the rules of practice is enclosed for your information. You will note that sections 202.5 through 202.22 are applicable to disciplinary proceedings. In this proceeding the burden of proof will be upon the complainant to establish the matters complained of.

In accordance with these rules of practice, you may have 20 days after the receipt of this letter within which to file with the Hearing Clerk an answer, in quadruplicate, containing a definite statement of the facts which constitute [fol. 45] the grounds of defense, and specifically admitting, denying, or explaining each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Your answer, as well as any motions or requests that you may wish to file hereafter in this proceeding, should be addressed to the Hearing Clerk, United States Department of Agriculture, Washington 25, D.C.

Very truly yours,

/s/ Agnes B. Clarke, Hearing Clerk

ERMeyer
7-8-55

cc: L.D. Sinclair, P & S Branch, Livestock Division, AMS
Charles B. Jennings, Room 403 L.S. Exch. Bldg. Stockyards Station, Denver 16, Colo. Lyman S. Hulbert, Attorney at Law, 744 Jackson Place, N.W., Washington 6, D.C.
Enclosures 2

BEFORE THE SECRETARY OF AGRICULTURE

ANSWER—Filed July 29, 1955

Comes now the respondent and answers the complaint as follows:

1. With respect to paragraph 1 of the complaint*, the respondent did, on May 11, 1955, issue its Tariff No. 14, effective May 25, 1955, containing its schedule of rates and charges for its stockyard services and all of its rules and regulations, currently effective, including Item 10 (c) of its rules and regulations as quoted in the complaint, but, in so far as Item 10 (c) is concerned, this merely constituted an amendment to the item as originally issued by the respondent on January 27, 1955, effective February 10, 1955.

[fol. 46] 2. With respect to paragraph 2 of the complaint (page 2), it is true that an organization known as the Producers Livestock Marketing Association is presently operating as a market agency at the Denver Union Stockyards, and that it has so operated for a number of years. Respondent also is informed and believes that such organization or related organizations have been engaged in buying and selling livestock in the country surrounding the Denver Union Stockyards or elsewhere either on their own accounts or for others, but the respondent is without exact knowledge as to the truth or falsity of all the other allegations and demands strict proof thereof.

3. With respect to paragraph 3 of the complaint (page 2), the respondent is informed and believes that the matters contained therein are legal conclusions or arguments as to which no answer is required, but, in so far as an answer may be proper, the respondent denies the same and alleges that Item 10 (c) of its rules and regulations does not affect any of its rates and charges set forth in its currently effective schedule of rates and charges and that Item 10 (c) is a regulation in respect to the furnishing of stockyard,

* The complaint is in the form of a letter from the Producers Livestock Marketing Association, by its attorney, Lyman S. Hulbert, to the Secretary of Agriculture, dated July 7, 1955, consisting of four pages and divided into eight paragraphs.

services by the respondent, and furthermore is a reasonable, fair, and non-discriminatory rule and regulation, lawfully made. The term "stockyard services" as defined in the Act contemplates and includes far more than the mere physical handling of the livestock.

4. With respect to paragraph 4 of the complaint (page 2), the respondent is informed and believes that the matters contained therein are legal conclusions as to which no answer is required, but, in so far as an answer may be deemed appropriate, the respondent denies the same and alleges that it is required to furnish stockyard services only to those persons and organizations who comply with the reasonable rules and regulations of the respondent.

5. With respect to paragraph 5 of the complaint (page 2), the respondent is informed and believes that the matters contained therein are legal conclusions or arguments as to which no answer is required, but, in so far as an answer may be deemed proper, the respondent denies the same and denies that Item 10 (c) of its rules and regulations is unjust, unreasonable, or discriminatory.

[fol. 47] 6. With respect to the allegations of paragraph 6 of the complaint (page 3), the respondent is informed and believes that, except with respect to those allegations in paragraph 6 (c) regarding the nature and operations of the complainant, no answer is required since such allegations are merely purported legal interpretations of Item 10 (c) of the respondent's rules and regulations—which regulations speak for themselves—, but in so far as an answer may be deemed to be required, the respondent denies that paragraph 6 of the complaint contains a completely correct interpretation of Item 10 (c), as applied to the situations described therein. The respondent also is without information as to the truth or falsity of the allegations in subparagraph (c) of paragraph 6 concerning the nature and operations of the complainant and demands strict proof thereof.

7. With respect to the first three sentences of paragraph 7 of the complaint (page 3), the respondent is without information as to the truth or falsity of the allegations con-

tained therein with respect to the history and nature of operations of the complainant and demands strict proof thereof. With respect to the allegations contained in the fourth sentence of paragraph 7 (bottom of page 3 and top of page 4), such allegations merely repeat the allegations set forth in subparagraph (a) of paragraph 6 and the first sentence of subparagraph (c) of paragraph 6 of the complaint (page 3). This respondent again denies.

Affirmative Defenses

As affirmative defenses, the respondent alleges that—

8. It was necessary to issue Item 10 (c) of respondent's rule and regulations to enable it and the market agencies operating at the Denver Union Stockyards to furnish, upon reasonable request, without discrimination, reasonable stockyard services at such stockyards, and to enable the patrons of the Denver Union Stockyards to secure, upon reasonable request, without discrimination, reasonable stockyard services at this stockyards, since the respondent and the market agencies at such stockyards can not furnish, nor can their patrons receive, reasonable stockyard serv- [fol. 48] ices at the Denver Union Stockyards as long as certain market agencies and dealers operating at such stockyard engage in operations away from this stockyard (now prohibited by Item 10 (c)) which will render it impossible for such market agencies and dealers to carry out their primary duties and responsibilities at the Denver Union Stockyards.

9. It was necessary for the respondent to establish, and it is necessary for it to enforce, Item 10 (c) in order to carry out its statutory duty to establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices with respect to the furnishing of stockyard services at the Denver Union Stockyards, since, except for Item 10 (c), certain market agencies and dealers operating at the Denver livestock market also would engage in activities elsewhere (now prohibited by Item 10 (c)) which would make it impossible for them to carry out their primary duties and responsibilities at the Denver Union Stockyards.

10. It was necessary to issue Item 10 (c) in order to eliminate unjust, unreasonable, and discriminatory practices followed by market agencies and dealers, operating at the Denver Union Stockyards, resulting from their activities in the area in Colorado contiguous to this stockyards, specified in Item 10 (c) of the regulation, which rendered it impossible for such market agencies and dealers to perform their duties and responsibilities at this market.

11. It was necessary to issue Item 10 (c) to prevent market agencies and dealers operating at the Denver Union Stockyards from engaging in a practice with respect to livestock in the area contiguous to the Denver Union Stockyards specified in Item 10 (c) which created an undue, unreasonable, and unlawful advantage, prejudice, and preference as between persons and localities in intrastate commerce in livestock and interstate commerce in livestock, and an undue, unjust, unreasonable, and unlawful discrimination against interstate commerce in livestock, resulting from the diversion of livestock from the Denver Union Stockyards, the consequent fluctuation in prices of livestock handled in interstate commerce at such stockyards, [fol. 49] and the failure of some market agencies and dealers operating at the Denver Union Stockyards to carry out their duty to render reasonable stockyard services at the Denver market and to establish and observe just, reasonable and non-discriminatory practices at such stockyards in respect to the furnishing of stockyard services.

12. With reference to the complainant's request that Item 10 (c) be suspended pending the outcome of this proceeding, there is no authority in the law to suspend Item 10 (c) since, as alleged in paragraph 3 of the complaint (page 3), Item 10 (c) is not "a new regulation or practice affecting any rate or charge" set forth in the respondent's currently effective schedule of rates and charges contained in its Tariff Number 14.

Wherefore, the premises considered, the respondent requests that it be granted an oral hearing at Denver, Colorado, that complainant's request for interim suspension

of Item 10 (c) be denied, and that the complaint be dismissed.

Respectfully submitted,

The Denver Union Stock Yard Company, By /s/ Winston S. Howard, Pershing, Bosworth, Dick & Dawson, 320 Equitable Building, Denver 2, Colorado, Telephone Acoma 2-1611, By /s/ Ashley Sellers, Sellers & Conner, 1625 Eye Street, Northwest, Washington 6, D.C.

Dated: July 29, 1955.

Received July 29, 1955. Hearing Clerk

[fol. 50] BEFORE THE SECRETARY OF AGRICULTURE

MOTION FOR ORDER TO REQUIRE COMPLAINANT TO PRODUCE SPECIFIED BOOKS AND RECORDS FOR EXAMINATION AND COPYING—Filed August 12, 1955

Comes now the respondent, by its attorneys, and moves for an order requiring the complainant to produce the books and records hereinafter specified for examination or copying by the respondent at complainant's office located in Room 309, Livestock Exchange Building at the Denver Union Stockyards, Denver, Colorado, or such other place as may be specified in such order, on the 19th day of September, 1955, at 10:00 a.m., m.s.t.

The books, papers, letters and other documents of the complainant with respect to which this request is made are as follows:

(1) All of the accounts of sales and accounts of purchases, and such other records, including contracts of sale and contracts of purchase and related memoranda and communications pertaining to all livestock sales and purchase transactions either by the complainant or its wholly owned subsidiary, the Western Order Buyers, or by the employees of the complainanat and of its said subsidiary for the account of the complainant, from July 1, 1951 to and including June 30, 1955, in the area specified in Item 10 (c) of respondent's rules and regulations (i.e., in the

area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska State Line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U.S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence South on Highway 71 to Timpas; thence Southwesterly via Highway 350 to Trinidad; thence South to New Mexico state line).

(2) The payroll list or other records showing the names and addresses of all of the employees of the complainant and its wholly owned subsidiary, the Western Order Buyers, and all records showing names and addresses of members of complainant during the period July 1, 1951 to and including June 30, 1955, who made purchases or sales of [fol. 51] livestock for the account of the complainant in the area specified in Item 10 (c) of the respondent's rules and regulations as indicated above.

As grounds in support of the foregoing motion, the respondent respectfully alleges as follows:

In the early part of July 1955, there was served upon the respondent a complaint filed by the complainant challenging the validity of Item 10 (c) of the respondent's rules and regulations originally effective February 10, 1955, as amended effective May 25, 1955, on the grounds that such item of the respondent's regulations is unauthorized and invalid under the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181 et seq., and that such regulation is unjust, unreasonable, and discriminatory. Thereafter, on July 29, 1955, the respondent filed its answer in which it denied the material allegations of the complaint and in which the respondent set forth certain affirmative defenses. In view of the issues raised by the complaint and answer, it is essential in this proceeding for the complainant to make known of record the true facts with respect to its operations during the period July 1, 1951 through June 30, 1955, inclusive, in the area designated in Item 10 (c) of the respondent's rules and regulations specified above,

away from the Denver Union Stockyards where the complainant is a registrant, whether such operations were conducted by the complainant in its own name or for its account by its subsidiary or by the employees of either the complainant or such subsidiary.

Examination of the books and records specified above will disclose the volume of livestock which has been purchased or sold by the complainant away from the Denver Union Stockyards within the geographical area designated above, which livestock would normally have been consigned to the Denver Union Stockyards and which thus has been diverted from such stockyards by the complainant. It is such diversion of livestock away from the Denver Union Stockyards by the complainant and others which would prevent the patrons of the Denver Union Stockyards from receiving reasonable stockyard services as required by the Packers and Stockyards Act of 1921, as amended, and would, further, create an undue advantage, prejudice, preference and discrimination with respect to interstate commerce in [fol. 52] livestock—to eliminate which, the respondent was required to issue Item 10 (c) of its rules and regulations. The information requested in paragraph (2) above would permit the respondent to identify such transactions as were made in the names of individual employees of the complainant, or of its subsidiary, for the account of complainant or its subsidiary.

The books and records requested herein to be produced by the complainant are, therefore, competent, relevant and material to the issues raised herein. They are under the exclusive control and exclusive possession of the complainant or its agents and employees; and they are not available to the respondent except by virtue of the requested order. Accordingly, since these materials are indispensable to a complete record on the issues raised by the complainant by the pleadings, it is respectfully requested that this motion be granted and that an order be entered directing the complainant to appear at the time and place requested

herein and to produce for examination and copying, by the respondent, the books and records described above.

Respectfully submitted,

The Denver Union Stockyard Company, By /s/ Winston S. Howard, Pershing, Bosworth, Dick & Dawson, By /s/ Ashley Sellers, Sellers & Conner

[Verified.]

Received August 12, 1956. Hearing Clerk

State of Colorado City and County of Denver SS

AFFIDAVIT OF L. M. PEXTON IN SUPPORT OF MOTION

L. M. Pexton, being first duly sworn, deposes and says as follows:

My name is L. M. Pexton and I am President of the Denver Union Stock Yard Company, the respondent in a proceeding instituted under the Packers and Stockyards [fol. 53] Act of 1921, as amended, 7 U.S.C. 181 et seq. to inquire into the validity of Item 10 (c) of the rules and regulations issued by the respondent originally on January 27, 1955, amended effective May 25, 1955, with respect to the furnishing of stockyard services at the Denver Union Stockyards. Such proceeding was instituted upon the basis of a complaint by the Producers Livestock Marketing Association, an organization presently operating as a market agency at the Denver Union Stockyards.

This affidavit is made by me in support of a motion filed by the respondent in the above-mentioned proceeding to require Producers Livestock Marketing Association, the complainant in such proceeding, to produce certain books and records for examination and copying by the respondent.

Upon the basis of information and belief, it is my understanding that during the period July 1, 1951 to June 30, 1955, the complainant, while registered as a Market Agency for the conduct of a commission agency business at the Denver Union Stockyards continually diverted away from

the Denver Union Stockyards a large volume of livestock originating within the geographical area designated in Item 10 (c) of the respondent's rules and regulations which is an area immediately contiguous to the Denver Union Stockyards. This livestock normally would have been consigned to the Denver Union Stockyards.

I am informed and believe that the complainant, among other things, diverted lambs from the area in question which normally would have been consigned to the Denver market by selling such lambs direct to many packers, both national and independent, including some located on the Atlantic Coast and in interior Iowa, and further, I am informed and believe that the complainant made such diversions at the very same time that it was purporting to be using its best efforts to secure for its patrons on the Denver market, the highest possible price by selling lambs at the Denver market.

It is further my information and belief that, in many cases, the complainant made many of its sales both at the Denver market and away from the Denver market in the area in question to the same packers and feeders.

[fol. 54] It is also my information and belief that in addition to purchasing and selling livestock in the designating area during the period in question on a commission basis, the complainant frequently purchased livestock in such area on speculation for its own account at the same time that it was acting as agent for others either at the Denver market or off the Denver market.

It is my information and belief that the foregoing and many like transactions were conducted by the complainant in its own name or for its account by its wholly owned subsidiary, the Western Order Buyers, or by the employees of the complainant or its said subsidiary. The foregoing activities of the complainant injured the patrons of the Denver Union Stockyards—both buyers and sellers—primarily by diverting from the Denver market livestock which normally would have been shipped to the market, with a consequent adverse effect on the prices received by the patrons at this market. As a result, the Denver Union Stock Yard Company in the early part of this year issued item 10 (c) of its rules and regulations which was designed

to make it possible for the patrons of the Denver market to secure, without discrimination, reasonable stockyard services at this stockyard and to eliminate an unjust, unreasonable, and discriminatory practice by the complainant and others and to remove an undue prejudice and discrimination against interstate commerce in livestock. The Denver Union Stockyards must, under the law, take pains to see that its patrons are not subjected to such harmful effects as that referred to herein. The management of the Stock Yard Company felt that, as pointed out by the Secretary of Agriculture on many occasions, market agencies operating at a public stockyard are not mere businessmen, free to do as they might wish for business reasons alone, but are public agencies occupying a fiduciary position, with an overriding duty to their market and to their patrons at the market where they are registered and that all of their other activities must be subordinated to this end. Consequently, it was felt that market agencies may not engage in transactions away from the Denver market inconsistent with the duties imposed upon them to render the best possible service which, when boiled down, means that they must refrain from diverting the normal flow of livestock to this market if they are to continue to *to* oper-
[fol. 55] ate at the market.

All of the facts regarding the activities of the complainant which give rise to the rule in question may be proved by examination of the records kept by the complainant with respect to its sales and purchases, during the period in question, in the designated area in Colorado. The names and addresses of the employees of the complainant and of its subsidiary are needed so as to enable the respondent to identify the sales for the account of the complainant which, upon the basis of information and belief, it is believed that the complainant caused to be made in the names of its employees or those of its subsidiary. The complainant itself has raised these issues with respect to its so-called country operations and the information concerning them is in the exclusive custody and control of the complainant. The only way the respondent can show the true facts is to secure the information from the complainant as requested in the motion under consideration. I believe all of the in-

formation is competent, relevant and material to the issues involved.

L. M. Pexton

Subscribed and sworn to before me this 10th day of August, 1955.

My commission expires Dec. 2, 1958

(Seal) /s/ Eve M. Roger, Notary Public

Received August 12, 1956

BEFORE THE SECRETARY OF AGRICULTURE

REPLY TO MOTION FOR ORDER TO REQUIRE COMPLAINANT TO PRODUCE SPECIFIED BOOKS AND RECORDS FOR EXAMINATION AND COPYING FILED BY RESPONDENT—Filed September 7, 1955

Comes now the Complainant, by its attorney, and shows that it is not required to allow Respondent to examine its books and records as stated in said Motion because the regulations that are challenged in the above entitled proceeding were issued without authority of law and are en- [fol. 56] tirely unauthorized by the Packers and Stockyards Act, 1921. Said challenged regulations appear in Respondent's Tariff No. 14 issued May 11, 1955, effective May 25, 1955 and read as follows:

" Item 10.

" Interference With Operations

" (a) ....

" (b) ....

" (c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock

from this market which would otherwise normally come to this Stock Yards; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of live stock to the public market at this Stockyard.

"The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the State of Colorado except that part listed as follows:

The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U.S. Highway 36; to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on [fol. 57] Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

The provisions of paragraph (c) do not apply on live stock solely used for breeding purposes."

Said Packers and Stockyards Act of 1921 by its terms restricts the regulations that Respondent may issue to regulations under 7 U.S.C. 207 (b) in connection with a schedule of rates and charges "which in any manner change, affect, or determine any part or the aggregate of such rates or charges or the value of the stockyard services furnished" or to regulations under 7 U.S.C. 208 "in respect to the furnishing of stockyard services"; and the term "stockyard services" as used in said Act is defined in 7 U.S.C. 201 (b) as follows:

"the term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;"

Inasmuch as the challenged regulations do not relate to rates or charges or to stockyard services as defined in this Act, they are not authorized by the Packers and Stockyards Act, 1921 and are therefore invalid and beyond the powers of Respondent.

Complainant, by its attorney, further shows that said challenged regulations are on their face illegal and invalid because they restrain trade, divide the territory in which any market agency or dealer engaged in business on the Stockyard of Respondent may operate into some territory in which he may operate and into other territory in which he may not operate unless he is doing so with respect to the Stockyard of Respondent; and thus in the *proscribed* area the challenged regulations reduce competition for the livestock of those farmers and ranchmen who desire to sell their livestock direct without having it go through any stockyard; and denies to all market agencies and dealers engaged in business at the Stockyard of Respondent the right to do business in the prescribed area unless such business is done with respect to the Stockyard of Respondent.

Complainant, by its attorney, further shows that said challenged regulations are on their face unjust and unreasonable.

[fol. 58] In view of the foregoing considerations, Complainant respectfully asks that it be found that said challenged regulations are invalid and of no force and effect; and that Complainant is not required to permit Respondent to examine and make copies of its books and records, as demanded by Respondent.

Complainant by its Attorney further shows that Western Livestock Order Buyers (Western Order Buyers) is not a subsidiary, wholly owned or otherwise, of Complainant and that Complainant has no right, power or authority to make its books and records available to Respondent as prayed for in Respondent's Motion to which this pleading is a reply.

Complainant, by its Attorney, hereby requests an oral hearing on the questions herein presented and respectfully requests that said oral hearing be held in Washington, D. C. at an early date. The privilege of submitting briefs on the questions herein presented is also requested.

Respectfully submitted,

Producers Livestock Marketing Association, By Lyman S. Hulbert, Its Attorney.

Received August 24, 1955. Hearing Clerk.
Filed Sept. 7, 1955.

MOTION TO STRIKE COMPLAINANT'S REPLY TO RESPONDENT'S MOTION FOR ORDER TO REQUIRE COMPLAINANT TO PRODUCE SPECIFIED BOOKS AND RECORDS FOR EXAMINATION AND COPYING FILED BY RESPONDENT—September 7, 1955

Comes now the Respondent, by its attorneys, and moves to strike the Complainant's Reply to the Respondent's Motion for an Order to Require Complainant to Produce Specified Books and Records for Examination and Copying for the following reasons:

1. The Reply is not responsive to the pending motion for an order to require the Complainant to produce, and [fol. 59] seeks a summary disposition of this proceeding contrary to the rules of practice.—

(a) The Complainant's Reply is wholly unresponsive to the Respondent's Motion for an order to produce certain books and records. The Respondent's Motion contains verified factual allegations as to the necessity of requiring the Complainant to produce certain books and records which are material to proof of certain factual issues raised by the Complaint and Answer. The factual allegations of the Respondent's motion to produce are supported by the Affidavit of Mr. L. M. Pexton, and such factual allegations have not been denied by the Complainant in its reply, or elsewhere, except in one immaterial respect*, and, ac-

* The sole instance in which the Complainant controverts the factual allegations contained in the Respondent's motion for an order to require the Complainant to produce certain books and records is with respect to the relationship between the Complainant and the Western Livestock Order Buyers. On page 3 of its Reply, the Complainant alleges that the Western Livestock Order Buyers is not a subsidiary wholly owned or otherwise by the Complainant. For the purposes of the Respondent's motion, the status of the relationship between the Complainant and the Western Livestock Order Buyers is immaterial since the latter, like the Complainant, is a registrant under the Packers and Stockyards Act of 1921, as amended (7 U.S.C.A. 181 et seq.). In any event, the Complainant's denial of the relationship is at variance with the finding of fact made in February 1955 by the Judicial Officer of the Department in a disciplinary proceeding involving the Complainant and the Western Livestock Order Buyers, as follows: "Respondent Western

cordingly, must be deemed to be admitted, for the purposes of the Res-ondent's motion.

(b) The posture of this proceeding is such that it can not be disposed of in the summary fashion requested by the Complainant on page 3 of its Reply. The Complainant asks that a ruling now be made that Item 10 (c) of the Respondent's regulations be declared invalid and of no force and effect. Complicated factual issues have been raised by the pleadings. The Respondent has requested an oral hearing on the facts, as authorized by Section 202.11 of the rules of practice (9 C.F.R. 202.11). In its pending motion for an order to require the Complainant to produce specified books and records, the Respondent has pointed out, with particularity, the competency, relevancy, and materiality of the records sought as they relate to the factual issues between the parties. Nowhere in the Reply does the Complainant deny the competency, relevancy, and materiality of the records which the Respondent seeks. Under the rules of practice, it is necessary for the Re-[fol. 60] spondent to be accorded an oral hearing on the facts, and the matter may not now be disposed of by a ruling that, as a matter of law, Item 10 (c) of the Respondent's regulation is invalid. The basic issue between the parties involves a mixed question of fact and law which, under the rules of practice, can only be determined after a full hearing on the facts, in connection with which it is essential for the Complainant to produce the records sought in the Respondent's pending motion.

2. Aside from the foregoing, in its Reply, the Complainant makes no showing why the Respondent's motion should not be granted.— Under the circumstances, it is a complete non sequitur for the Complainant, in its Reply, to take the position that the Complainant should not be required to produce the books and records requested in the Respondent's pending motion simply because the Com-

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Livestock Order Buyers is a Utah corporation wholly owned by Producers and is registered with the Secretary of Agriculture as a market agency to buy livestock on a commission basis, and as a dealer to buy and sell livestock for its own account at the stockyards . . .". (In Re Producers Livestock Marketing Association, et als. P. & S. Docket No. 2125, 14 A.D. 109).

plainant feels that Item 10 (c) of the Respondent's regulations is invalid. That, of course, is the very question to be ultimately determined in this proceeding. This issue depends upon the reasonableness of item 10 (c) of the Respondent's regulations, which relates to the conditions under which the Respondent will continue to furnish certain stockyard services at the Denver Union Stock Yards to market agencies and dealers who desire to operate at such stockyards. For all of the reasons pointed out in the Answer, it was necessary for the Respondent to issue Item 10 (c) of its regulations. The reasonableness of this item of the regulation is grounded in the facts which gave rise to its issuance. As alleged in its pending motion for an order to require the Complainant to produce certain of its books and records, the Complainant has sole custody of material evidence relating to the facts which is not otherwise available to the Respondent. Such evidence is competent, relevant, material, and indispensable to proof of the issues [fol. 61] in this proceeding as shown in the Respondent's verified motion and in the accompanying Affidavit of Mr. L. M. Pexton in support thereof. In view of the foregoing, it is obvious that, in its Reply, the Complainant simply begs the basic question at issue and seeks to avoid a factual investigation of its activities which would reveal the reasonableness of Item 10 (c) of the Respondent's regulations.

Conclusion

For the foregoing reasons, it is respectfully requested that the Complainant's Reply be stricken, and that the Respondent's pending motion for an order to require the Complainant to produce certain books and records be granted.

Respectfully submitted,

The Denver Union Stock Yard Company, By /s/ Winston S. Howard, Pershing, Bosworth, Dick & Dawson, By /s/ Ashley Sellers, Sellers & Conner

Dated: Sept. 7, 1955. Received September 7, 1955. Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

STAY ORDER—September 15, 1955

The above docket was assigned to Hearing Examiner Jack W. Bain on September 12, 1955.

The letter of service of the complaint contains a statement that it has been determined that this is a disciplinary proceeding to be instituted under section 202.6 (b) of the rules of practice. The record contains no such determinations.

As the examiner must base his actions on the record alone, further proceedings herein are stayed until the record is made to show by whom and under what authority any binding determinations, decisions, or rulings have heretofore been made in this docket, and their specific terms. [fol. 62] Copies hereof shall be served upon the parties and upon the Agricultural Marketing Service.

Jack W. Bain, Hearing Examiner

September 15, 1955

BEFORE THE SECRETARY OF AGRICULTURE

MEMORANDUM FROM ASSISTANT GENERAL COUNSEL TO HEARING CLERK—September 21, 1955

To: Hearing Clerk, Office of the Secretary

From: Assistant General Counsel

Subject: Producers Livestock Marketing Association v. Denver Union Stock Yard Company, P. & S. Docket No. 2176

This will acknowledge receipt by the Agricultural Marketing Service of a copy of an order entitled "Stay Order" issued by Hearing Examination Jack W. Bain on September 15, 1955.

The Hearing Clerk of the Department was orally advised by the Office of the General Counsel of the determination referred to in the Examiner's order at the time the complaint initiating the proceeding was filed with the Hearing Clerk. The prospective parties to the proceeding were notified of the determination by letters addressed to them

by the Director of the Livestock Division, Agricultural Marketing Service, prior to the filing of the complaint with the Hearing Clerk. This has been the procedure in comparable proceedings heretofore initiated. However, in view of the Examiner's order and to insure a clear record a statement of the Director is attached hereto for filing in the record in this proceeding.

As to the authority for such determination see Federal Register, Volume 19, pages 35, 36, 74, 76, and Volume 11, pages 177A-258, 274, and Sections 202.3 and 202.6 of the rules of practice governing proceedings under the Packers and Stockyards Act.

/s/ Charles W. Bucy

By direction of the Deputy Administrator for Marketing Services, Agricultural Marketing Service

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[fol. 63] BEFORE THE SECRETARY OF AGRICULTURE

STATEMENT ATTACHED TO MEMORANDUM

As Director of the Livestock Division, Agricultural Marketing Service, and pursuant to authority and discretion theretofore vested in me, upon finding that the informal complaint made by the complainant in the above entitled proceeding could not be disposed of informally by the parties, I determined that the aggrieved party's complaint should be entertained as the moving paper initiating a proceeding under the rules applicable to disciplinary proceedings as set forth in section 202.6 et seq. of the rules of practice governing proceedings under the Packers and Stockyards Act.

The prospective parties to the proceeding were notified of the foregoing determination by mail on July 5, 1955, and thereafter the Producers Livestock Marketing Association, who filed the informal complaint, filed with the Hearing Clerk moving papers in triplicate, thus initiating the present proceeding as provided in section 202.6 of the rules of practice.

H. E. Reed, Director, Livestock Division, Agricultural Marketing Service.

Received September 21, 1955. Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

NOTICE OF ARGUMENT ON MOTION—September 28, 1955

By a statement and memorandum filed herein on September 21, 1955, the record now shows the terms and authority under which this proceeding was instituted by the complainant. Accordingly, further action need be stayed no longer.

The record also contains a motion by the American Farm Bureau Federation to be allowed to intervene. Respondent has filed opposition to this motion and has requested time to file written argument on it.

It now seems to the examiner that the provision of the rules of practice referred to in the motion to intervene is not applicable to this disciplinary proceeding. However, [fol. 64] no ruling in this regard will be made until after consideration of any arguments submitted for the record. Such arguments may be filed in writing by October 12, 1955, and may be answered in writing by October 19. Other motions will be considered after the question of intervention has been decided. It is now contemplated that oral argument on other motions will be set.

Copies hereof shall be served on the parties and on counsel for the American Farm Bureau Federation.

Jack W. Bain, Hearing Examiner.

September 28, 1955.

Received September 28, 1955. Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

TELEGRAPHIC WITHDRAWAL BY AMERICAN FARM BUREAU FEDERATION OF MOTION TO INTERVENE—September 30, 1955

Western
Union

1955 Sep 30 PM 6 14

—MA279
M VOW 232 PD — WV Chicago Ill 30 408PMC—
Hearing Clerk—

US Dept of Agriculture Wash DC—

In order to avoid any possibility of delay which might result from having interested parties submitting arguments on our motion to intervene in hearing on Denver Stockyards Proceeding designated packers and stockyards docket No 2176 American Farm Bureau Federation hereby withdraws said motion to intervene this action in no way indicates any change in our position regarding principles involved—

Allen A Lauterbach General Counsel—

BEFORE THE SECRETARY OF AGRICULTURE

NOTICE OF ORAL ARGUMENT ON MOTIONS—October 11, 1955

The matter of intervention in this proceeding has been settled by withdrawal of the motion for leave to intervene. It is therefore unnecessary to delay further proceedings until October 19, the end of the time allowed for filing [fol. 65] written arguments on intervention.

Oral argument on other motions and requests of record is set to begin at 10 a.m. on Friday, October 21, 1955, in Room 331-W, West Wing of the Administration Building, United States Department of Agriculture, Washington, D. C.

Jack W. Bain, Hearing Examiner.

October 11, 1955.

Received Oct. 11, 1955 The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

AFFIDAVIT OF W. C. CREW IN SUPPORT OF MOTION TO REQUIRE PRODUCTION OF CERTAIN BOOKS AND RECORDS, ETC.—Filed October 21, 1955

W. C. Crew, being first duly sworn, deposes and says as follows:

My name is W. C. Crew and I am Vice President and General Manager of the Denver Union Stock Yard Company, the respondent in a proceeding instituted under the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181 et seq., to inquire into the validity of Item 10 (c) of the rules and regulations issued by the respondent originally on January 27, 1955, amended effective May 25, 1955, with respect to the furnishing of stockyard services at the Denver Union Stockyards. Such proceeding was instituted upon the basis of a complaint by the Producers Livestock Marketing Association, an organization presently operating as a market agency at the Denver Union Stockyards.

This affidavit is made by me in support of a motion filed by the respondent in the above-mentioned proceeding to require the Producers Livestock Marketing Association, the complainant in such proceeding, to produce certain books and records for examination and copying by the respondent.

Affiant has personally made a preliminary search of the books and records of the Denver Union Stock Yard Company kept in the ordinary course of business, which revealed certain information concerning a large number of transactions which are pertinent to this inquiry, of which [fol. 66] the following are illustrative. The records of the Denver Union Stock Yard Company do not contain complete information on these shipments and affiant believes that the sole source of this information is the records requested in this motion, and that the information contained therein is indispensable to a complete presentation of the issues in this proceeding.

I. On September 26, 1954, a shipment of livestock was unloaded at 8:15 p.m., in the Denver Union stockyards for feed, water, and rest, and the shipment was moved into

stockyard pens for servicing. The Stockyard records disclose that the shipment was made by one Perry Holly from Hayden, Colorado, on September 25, 1954, to the Producers Livestock Marketing Association, with its destination at Chicago, Illinois. Prior to the arrival of the shipment at Denver, the destination, Chicago, Illinois, had been changed, and the shipment had been diverted to Producers Livestock Marketing Association at Eaton, Colorado, on the authority of one Bill Hilbert. The origin of this shipment was within the designated area covered by Rule 10 (c) of respondent's regulations. The shipment moved out of the Denver yard to said consignee at Eaton, Colorado, on September 27, 1954.

Affiant believes Perry Holly was not the owner of these sheep, although being shown as the shipper, and affiant further believes Perry Holly was an employee of Producers Livestock Marketing Association, acting solely on its behalf. Affiant is without knowledge or belief as to the original owner of these sheep or the name of the ultimate purchaser at Eaton, Colorado. Affiant is uninformed as to which particular office of Producers Livestock Marketing Association collected for the sheep and for whom such collection was made. It is the personal knowledge of the affiant that "Bill Hilbert" is a salesman-employee of the Producers Livestock Marketing Association at Denver, Colorado, and is the head of the sheep department of said firm at Denver, and that Mr. Hilbert would normally be contacted to execute orders for feeder sheep originating from Eaton, Colorado. Affiant is uninformed as to whether or not Mr. Hilbert received a buying commission for purchasing these sheep on behalf of an undisclosed customer; whether Mr. Hilbert had an order for feeder sheep prior to the shipping of this particular consignment; whether Mr. Hilbert had sheep on the market for sale which had been consigned to Producers [fol. 67] Livestock Marketing Association from which he could have executed this order; whether other sheep were available on the market at the time with which he could have filled the order; whether these sheep were in actual competition with sheep that had been consigned to the Producers Livestock Marketing Association at Denver, or with other sheep consigned to other commission firms for sale

on the Denver market, but affiant believes that the books and records so sought of complainant would supply such information.

II. From records of the Denver Union Stock Yard Company at Denver, Colorado, it appears that a shipment of feeder lambs was made by the Producers Livestock Marketing Association on October 9, 1954, from Wolcott, Colorado, within the designated area covered by respondent's rule, Item 10 (c), to the Producers Livestock Marketing Association, destined Chicago, Illinois. October 9, 1954, was a Saturday. The shipment was unloaded at the Denver Stockyards on October 10, 1954, and yarded into stockyard pens for feeding and servicing. On October 10, 1954, the Producers Livestock Marketing Association, since it was shown to be the owner of the livestock, was charged for the feed. On October 11, 1954, a Monday, the livestock again was fed with no change being made in the ownership. On October 12, 1954, a Tuesday, and more than 48 hours after the shipment had been unloaded for feed, water, and rest, the shipment was ordered forwarded by the Producers Livestock Marketing Association to Leo Fletcher, care of Joe Spady, at Fort Lyons, Colorado, thus showing a distinct change of consignee while the shipment was resting within the confines of the Denver Union Stockyards. Instructions were given the Denver Union Stock Yard Company to weigh the livestock, and instructions carried a notation "Diversion notice attached."

It thus appears that the livestock may have been shown to the new consignee at Denver, and that a sale may actually have been consummated at Denver. Affiant believes that the original intent of the shipment was to go to Chicago, Illinois, but by the interruption of its movement at Denver, and its ultimate diversion to a consignee other than that shown originally, it thus appears that a sales transaction occurred while the shipment was at the market. The [fol. 68] full relation between the country transaction and the market transaction can not be determined from records in possession of respondent.

III. On September 24, 1954, the Denver Union Stock Yard Company, Denver, Colorado, unloaded a shipment of

fat lambs and yarded them into pens for feeding and servicing. From the stockyard company records, affiant is informed that the shipment of lambs was made by the Producers Livestock Marketing Association on September 22, 1954, from Montrose, Colorado, an origin point within the designated area covered by respondent's regulation Item 10 (c), consigned to Producers Livestock Marketing Association with destination at Chicago, Illinois. Affiant believes that at Montrose, Colorado, the name of the shipper (Producers Livestock Marketing Association) was changed "Swift and Co.", and that the consignee formerly shown as Producers Livestock Marketing Association was changed to "Omaha Pkg. Co." It is this affiant's knowledge that the Omaha Packing Co. was at that time a subsidiary of and an unloading point at Chicago, Ill., for Swift and Company. The shipment was fed at Denver and loaded out on September 24, 1954. [This shipment was fed at Denver and loaded out on September 24, 1954.] [sic] This transaction indicates that Producers Livestock Marketing Association, as the original shipper, must have purchased sheep from a grower in the Montrose area and that on its own behalf it offered said sheep for sale at some point to Swift and Company on some condition of sale. Swift and Company are regular buyers of sheep on the market at Denver and Producers Livestock Marketing Association is a registered commission firm at Denver normally selling sheep to Swift and Company at Denver which, on many occasions, have been forwarded to said company at Chicago or at the Omaha Packing Company, Chicago. Respondent's records do now show where or when or by whom contact was made by the Producers Livestock Marketing Association with Swift and Company or whether or not said commission company was selling its own sheep to a regular market customer in competition with sheep offered through it or to others for sale at the Denver market at approximately the same time.

IV. Respondent's records indicate that on September 16, 1954, the Producers Livestock Marketing Association made [fol. 69] a shipment of sheep from DeBeque, Colorado, within the designated area covered by Respondent's Regulation 10 (c), to Producers Livestock Marketing Associa-

tion, with designation, Chicago, Illinois. From respondent's records, affiant has knowledge that, on September 17, 1954, the shipment of sheep was unloaded at the Denver Union Stock Yard Company and yarded into pens for feeding and servicing. While the shipment was at rest in the Denver Union Yards and being fed for the account of Producers Livestock Marketing Association, a change in ownership occurred and the shipment was billed out to Swift and Company, Gering, Nebraska. After feeding for the second time, and on September the 18th, the shipment moved to Gering, Nebraska. Under normal conditions, shipments moving in transit stopped at Denver for feed, water, and rest would be forwarded within a 24 hour period after arrival and after the expiration of 5 hours. This shipment however, laid over at Denver an extra day, during which time this change of ownership occurred. This affiant is unable to determine from respondent's records whether or not these lambs were the property of the Producers Livestock Marketing Association, whether or not they were sold directly to Swift and Company, whether or not the transaction occurred after showing the lambs at Denver, or any other circumstances surrounding the sale. It is affiant's belief that the records of the Producers Livestock Marketing Association will disclose whether or not lambs belonging to it were offered to a packer normally purchasing livestock at Denver to the exclusion of fulfillment of said order by livestock consigned to said commission firm for sale at Denver.

V. Respondent's records indicate that, on November 7, 1953, the Producers Livestock Marketing Association made a shipment of cattle from Craig, Colorado, within the designated area covered by respondent's Regulation 10 (e), consigned to Producers Livestock Marketing Association at Galesburg, Illinois. On November 8, 1953, respondent unloaded and yarded into stockyard pens for servicing this shipment of cattle. While in the stockyard, respondent noted changes had been made in the destination of these cattle, leading it to believe that, rather than being so-called country transaction from Producers Livestock Marketing Association to itself at Galesburg, Illinois, the shipment was consolidated with other cattle belonging to said firm

[fol. 70] at Denver for sale. It was and is affiant's belief that trading transactions took place on these cattle while supposedly resting at the stockyard, and that Producers Livestock Marketing Association actually offered these animals for sale in competition with other cattle consigned to it for sale. Affiant is without information as to whether or not Producers Livestock Marketing Association disclosed that said cattle were its own and were being sold for its own account. Affiant further believes that this shipment may have been sold by the Producers Livestock Marketing Association to its subsidiary, the Western Livestock Order Buyers, which, in turn, may have filled an order for livestock placed with it. Complainant later admitted sales on the Denver market of 93 head of cattle of which this shipment was a part. Affiant believes that the sole source of the details surrounding this transaction is the records sought.

Closing

The affiant is informed and believes that if the information sought by respondent's motion to produce is made available, that it will reveal that, in the foregoing instances and in numerous other similar instances, the Producers Livestock Marketing Association or the Western Livestock Order Buyers have continuously engaged in the practice of diverting livestock from the Denver Union Stockyards which would normally have come to such market; that they have also dealt in livestock off the Denver Union Stockyards, either directly or indirectly through the names of their employees or otherwise, in a manner which disabled them from engaging in effective selling operations at the Denver Union Stockyards with respect to livestock consigned to them at such stockyards for handling; that they have, in other instances, used livestock in their custody at Denver on through shipments to compete with other livestock of their patrons consigned to them at the market for sale; that in still other instances, they have sold their own livestock in transit to fill orders received by them at the Denver Union Stockyards; and that, by the foregoing operations, the Producers Livestock Marketing Association and the Western Livestock Order Buyers have unduly

prejudiced the handling of livestock in commerce at the Denver Union Stockyards and have discriminated against [fol. 71] such livestock in commerce at the Denver Union Stockyards.

/s/ W. C. Crew

Sworn to and subscribed before me this 21st day of October, 1955.

/s/ Lucy P. Baglia, Notary Public, My Commission Expires April 14, 1960.

Received October 21, 1955. Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

INTERIM RULING AND NOTICE OF HEARING—December 6, 1955

This is a proceeding under the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.). As defined in the applicable Rules of Practice (9 CFR, Part 202), it is a "disciplinary" proceeding, as distinguished from a "rate" or "reparation" proceeding (9 CFR 202.2 (l), (m), (n)). Because it was instituted by someone other than the Agricultural Marketing Service, it must be a proceeding under section 304 or 307 of the act (9 CFR 202.6(b)).

Section 304 of the statute requires stockyard owners and market agencies to furnish reasonable stockyard services without discrimination upon reasonable request. Section 307 requires stockyard owners and market agencies to set up and observe reasonable practices and regulations in furnishing stockyard services. We find nothing in these statutory provisions which prevents respondent from doing anything not specifically authorized. These are not grants of power, denying all powers not granted. They are limitations on existing power, denying only what is specifically denied.

The question before us is whether respondent has violated either of these sections. In other words, has respondent failed to furnish reasonable stockyard services, or has it set up some unreasonable practice or regulation?

We think the question of reasonableness depends upon facts, the circumstances surrounding the action taken. So [fol. 72] it seems necessary to hear the facts. We cannot hold, as complainant asks, that respondent's regulation violates the law on its face. We must have facts to see whether the regulation, or action taken under it, is reasonable under the circumstances. If it is, we cannot find any violation warranting disciplinary action. If it is not, then we must see what disciplinary action should be taken.

As we cannot decide for complainant as a matter of law, it seems necessary to go to hearing. Under these circumstances, respondent would be entitled to the subpoena it has requested. However, we must realize, on the record before us, that complainant does not want the subpoena issued. It does not seem necessary to go through the form of issuing the subpoena, having complainant move to quash it, and going on from there. We suggest, rather, the following procedure.

Oral hearing in this proceeding is set to begin at 10 a.m. on Tuesday, January 24, 1956, in Denver, Colorado. The parties will be advised later of the location of the hearing room. When complainant has presented its evidence, respondent then may move to dismiss, renew its request for a subpoena, or take whatever other action it desires. If complainant has not then presented a case, respondent will not need a subpoena. If respondent then needs the subpoena, it is my present opinon that it will be granted, and time will be given to respondent to prepare its defense. If, of course, it should develop that respondent needs further cross examination of witnesses after obtaining data disclosed by the subpoena, witnesses may be recalled for further cross examination.

Copies hereof shall be served on the parties or their counsel of record.

Jack W. Bain, Hearing Examiner.

December 6, 1955.

Received December 6, 1955 Hearing Clerk.

[fol. 73] BEFORE THE SECRETARY OF AGRICULTURE

EXCEPTIONS OF COMPLAINANT TO INTERIM RULING AND NOTICE OF HEARING—Filed December 15, 1955

Comes now the Complainant in the above entitled case and respectfully excepts to the Interim Ruling and Notice of Hearing of the Hearing Examiner herein filed with the Hearing Clerk on December 6, 1955 and for grounds for said exceptions states that the Hearing Examiner erred in not holding that as a matter of law *that* the regulation of the Respondent challenged in this proceeding is illegal because it is not authorized by the Packers and Stockyards Act, 1921, because it is contrary to that Act and because it is in violation of the Anti-Trust Laws; and Complainant hereby respectfully reserves the right to raise and argue the foregoing contentions in later proceedings in this case.

Respectfully submitted,

Producers Livestock Marketing Association, By Lyman S. Hulbert, Its Attorney.

Received Dec. 15, 1956 The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

COMPLAINANT'S ELECTION TO REST—Filed December 23, 1955

Comes now the complainant in the above-entitled cause and states that the challenged regulation of respondent described in paragraph 1 of the Formal Complaint filed herein is illegal and invalid upon its face as a matter of law, that this complainant elects to stand upon the illegality of said regulation, as a matter of law, and states that it will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation as a matter of law.

Wherefore the complainant hereby rests and submits its case for final decision by the Secretary of Agriculture.

Producers Livestock Marketing Association, By Lyman S. Hulbert, Its Attorney.

Received Dec. 23, 1955 The Hearing Clerk.

[fol. 74] BEFORE THE SECRETARY OF AGRICULTURE

RESPONDENT'S MOTION TO DISMISS—Filed December 27, 1955

Comes now the Respondent, by its attorneys, and moves that the Complaint in this proceeding be dismissed, with prejudice, because of the Complainant's failure, on the record, to sustain the burden of making a prima facie case in support of its complaint, as evidenced by its election not to offer proof of its allegations and not to proceed in accordance with the Hearing Examiner's ruling of December 6, 1955.

Respectfully submitted,

The Denver Union Stock Yard Company, By Winston S. Howard, Pershing, Bosworth, Dick & Dawson, By Ashley Sellers, Sellers & Connor.

Dated: December 27, 1955.

Received Dec. 27, 1955, The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

CERTIFICATION BY HEARING OFFICER TO JUDICIAL OFFICER—December 28, 1955

On December 23, 1955, the complainant in this proceeding filed an election to rest without presenting evidence, and requested an early decision. The respondent filed a motion to dismiss on December 27.

The oral hearing set for January 24, 1956, now seems unnecessary, and will not be held.

The examiner does not believe that an Examiner's Report would contain any facts or reasons in addition to those known in his Interim Ruling of December 6, 1955. Therefore, pursuant to Section 202.10 (b) of the Rules of Practice, the proceeding is certified to the Judicial Officer for decision, with a recommendation that it be dismissed.

Copies hereof shall be served on the parties or their [fol. 75] counsel.

Jack W. Bain, Hearing Examiner.

December 28, 1955.

Received Dec. 28, 1955, The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

ANSWER OF COMPLAINANT TO MOTION TO DISMISS—
Filed December 29, 1955

Comes now the Complainant by its attorney in the above entitled case and states that the Complaint in this proceeding should not be dismissed, and that the allegations in said Complaint show that Complainant is entitled to bring and to maintain this proceeding; and that admissions, in the answer of the Respondent in this case and in other pleadings, papers, affidavits and statements filed or made herein by Respondent show and recognize that Complainant is entitled to bring and to maintain this proceeding.

Wherefore Complainant asks that said Motion To Dismiss be denied.

Respectfully submitted,

Producers Livestock Marketing Association, By Lyman S. Hulbert.

Dated December 29, 1955.

Received Dec. 29, 1955 The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

EXCEPTIONS BY COMPLAINANT TO RECOMMENDATION OF HEARING EXAMINER THAT THIS PROCEEDING BE DISMISSED—
Filed December 29, 1955

Comes how the Complainant to the above entitled case by its attorney and hereby excepts to the recommendation of the Hearing Examiner that this proceeding be dismissed, contained in his "Certification to Judicial Officer" filed December 28, 1955, and for grounds of said exception states that the challenged regulation of Respondent herein set forth in the first paragraph of the Complaint in this case [fol. 76] is on its face and as a matter of law illegal, is unauthorized by the Packers & Stockyards Act, 1921, is contrary thereto, is unreasonable, is unjust, is discriminatory, is in restraint of trade and contrary to law generally.

Complainant hereby requests an opportunity for full oral argument of the foregoing matters and things before

the Judicial Officer and the right to submit a brief or briefs thereon.

Respectfully submitted,

Producers Livestock Marketing Association, By Lyman S. Hulbert, Its Attorney.

Dated December 29, 1955.

Received Dec. 29, 1955 The Hearing Clerk.

BEFORE THE SECRETARY OF AGRICULTURE

ORDER ALLOWING BRIEFS AMICUS CURIAE—February 24, 1956

In this proceeding under the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.), involving the validity of a regulation issued by the respondent, Hearing Examiner Jack W. Bain made an interim ruling on December 6, 1955, to the effect that the regulation was not invalid on its face and he scheduled oral hearing upon the complaint and answer in Denver, Colorado, January 24, 1956. On December 23, 1955, the complainant elected to rest upon its face, stated that it would not present evidence at the scheduled hearing, and submitted its case for final decision in the Department. The respondent moved to dismiss the complaint with prejudice because of the complainant's failure to sustain the burden of making a prima facie case in support of its complaint. The hearing examiner thereupon certified the proceeding to the Judicial Officer for decision with a recommendation that the complaint be dismissed. The complainant filed exceptions and requested oral argument and the right to submit briefs.

The following have applied for leave to file briefs amicus curiae: Oklahoma Live Stock Marketing Association, National Live Stock Commission Company, National Feeder [fol. 77] Service Corporation, National Live Stock Producers Association, American Farm Bureau Federation, and Charles B. Heinemann, Jr. Such applications are granted and the briefs shall be filed as soon as possible but not later than March 19, 1956. Of course the briefs shall be limited to the matters in issue, namely, whether

the contested regulation is invalid on its face and whether the complaint should be dismissed for failure of the complainant to make out a prima facie case.

The request of Charles B. Heinemann, Jr., to participate in the oral argument is denied.

Done at Washington, D.C., this 24 day of February 1956.

Secretary's File
(Signed) Thomas J. Flavin, Judicial Officer.

Received February 24, 1956.

[fol. 78] IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
January 2, 1957

Before Honorable WALTER A. HUXMAN, Honorable JOHN C. PICKETT and Honorable DAVID T. LEWIS, Circuit Judges.

This cause came on to be heard on the merits and on the motion to dismiss, Hadlond P. Thomas, Esquire, appearing for petitioner, Neil Brooks, Esquire, appearing for respondents, United States of America and Ezra Taft Benson, Secretary of Agriculture, Winston S. Howard, Esquire, appearing for intervener, Denver Union Stock Yard Company.

Thereupon this cause was argued by counsel and was submitted to the court.

[fol. 79] UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5459—January Term, 1957

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a corporation of Salt Lake City, Utah, Petitioner,

v.

UNITED STATES OF AMERICA and EZRA TAFT BENSON, Secretary of Agriculture, Respondents,
DENVER UNION STOCKYARD COMPANY, Intervenor-Respondent.

ON PETITION TO REVIEW DECISION AND ORDER OF THE SECRETARY OF AGRICULTURE

OPINION—February 15, 1957

Hadlond P. Thomas (Frank Armstrong, Edward M. Garrett and Thomas & Armstrong were with him on the brief) for Petitioner.

Neil Brooks (J. Stephen Doyle, Jr. and Donald A. Campbell were with him on the brief) for Respondents United States and Secretary of Agriculture.

[fol. 80] Winston S. Howard (Dawson, Nagel, Sherman & Howard, Ashley Sellers, Jesse E. Baskette, Cummings, Sellers Reeves & Connor were with him on the brief) for Intervenor Denver Union Stockyard Company.

Before HUXMAN, PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

This is a proceeding brought by petitioner under the Hobbs Act[1] seeking review of an order of the Secretary of

[1] Act of December 29, 1950, 64 Stat. 1129, 5 U.S.C.A. 1031, et seq.

Agriculture made under the Packers and Stockyards Act of 1921 (42 Stat. 159 as amended, 7 U.S.C. 1952 Ed., sec. 181, et seq.)[2] Petitioner is a "marketing agency" as defined by the Act and has its principal office at Salt Lake City.[3] The United States is named respondent pursuant to stat-
[fol. 81] ute[4] and the Secretary of Agriculture by rule of this court.[5] The Denver Union Stockyard Company is a "stockyard owner" as defined by the Act and has intervened as a party in interest upon motion, and as a matter of right.[6]

Section 307 of the Act[7] provides:

> "It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful."

Under the purported authority of this section the stockyard company did on May 11, 1955, issue the following Regulation 10(c) contained in its "Tariff No. 14":

[fol. 82] "Item 10.

Interference With Operations

(a) . . .

(b) . . .

(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company

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[2] All further references to congressional enactments are to the Packers and Stockyards Act of 1921, as amended, except as specifically noted.

[3] 5 U.S.C. 1033 provides: "The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any such parties has its principal office, or in the United States Court of Appeals for the District of Columbia."

[4] 5 U.S.C.A. 1034.

[5] Rule 34 (1) as revised.

[6] 5 U.S.C.A. 1038.

[7] 7 U.S.C.A. 208.

property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the State of Colo- [fol. 83] rado except that part listed as follows:

The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence West and south along the western boundary of Yuma county to its intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes."

On July 7, 1955, the petitioner herein challenged the validity of the regulation by filing a complaint[8] with the Sec-

[8] The administrative proceeding instituted by the Petitioner was a disciplinary proceeding which the Secretary is authorized to conduct as a result of complaints made concerning regulations of stockyard owners (7 U.S.C.A. 211). The statute provides that "after full hearing upon a complaint" if the Secretary is of the opinion that the regulation is unjust, unreasonable, or discriminatory, he may order the stockyard owner to "cease and desist" from enforcing any such regulation (7 U.S.C.A. 211).

retary of Agriculture to which the stockyard company an-
[fol. 84] swered. The elaborations of complaint and answer need not be set forth for purposes of present inquiry except to state that the status of petitioner and intervenor are admitted together with the issuance of the regulation attacked. At the hearing set before the judicial officer of the Department of Agriculture petitioner elected to rest without offering evidence, choosing to submit its case upon the sole ground that the regulation was invalid as a matter of law, illegal upon its face. The judicial officer, acting for the Secretary of Agriculture, ruled that the regulation was not invalid upon its face; that absent factual support relative to the potential or actual effect of the provisions of the regulation upon petitioner and the stockyard company he could not adjudicate whether the regulation would have a valid or invalid application; and dismissed petitioner's complaint. Aggrieved by the result and facing expulsion from the Denver yard upon violation of the regulation, petitioner seeks this review.

Being a public utility[9] the stockyard company has the inherent right to adopt regulations in regard to those [fol. 85] phases of its business which are secondary to its major functions. Certain it is that the utility may prescribe rules for the conduct of its business and for its own protection from fraud or injury and may adopt and enforce reasonable and nondiscriminatory regulations to that end.[10] Such right is not necessarily dependent upon statutory authority. But a regulation the effect of which is to govern not only the services rendered by the stockyard company but also services provided by a marketing agency and which, if disobeyed, will divorce the two, can be lawful only if issued in furtherance of the basic duty established by sec. 304 of the Act which provides:

> "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request,

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[9] Stafford v. Wallace, 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735.

[10] Steele v. Clinton Electric Light & Power Co., 123 Conn. 180, 193 A. 613, 112 A.L.R. 232; DePass v. Broad River Power Co., 173 S.C. 387, 176 S.E. 325, 95 A.L.R. 545; Hugh H. Hawkins v. Vermont Hydro-Electric Corp., 98 Vt. 176, 126 Atl. 517, 37 A.L.R. 1359.

without discrimination, reasonable stockyard services at such stockyard . . . "

Our inquiry is thus limited to a determination of whether or not the proposed regulation has any possible lawful application to the statutory duties imposed upon the stock-[fol. 86] yard company and the marketing agency "to furnish reasonable stockyard services." Stated more specifically: Does a stockyard company, in order to furnish reasonable stockyard services, have a right to restrict, by regulation, the diversion of the normal flow of livestock to its yard occasioned by any act of a marketing agency done within the normal marketing area of the yard?

It is the position of the stockyard company, adopted at least in part by the Secretary, that the question so raised could not be determined without a "full hearing" with presentation of evidence on both sides in accordance with Sec. 310 of the Packers and Stockyards Act and the regulations 9 C.F.R. 202.11(a) and 9 C.F.R. 202.2(g). At such a hearing, so says the stockyard company, it intended to and would show that Regulation 10(e) was reasonable and necessary to prevent market agencies in the position of petitioner from undermining the business and public efficiency of the yard by the solicitation of business for other yards.

Although 9 C.F.R. 202.2(g) defines "hearing" to be "that part of the proceeding which involves the submission of evidence", it is fundamental to the law that the submission [fol. 87] of evidence is not required to characterize "a full hearing" where such evidence is immaterial to the issue to be decided. In construing a similar provision of the Interstate Commerce Act the Supreme Court has defined a full hearing as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. *Akron, C. & Y. Ry. Co.* v. *United States*, 261 U.S. 184, 43 S. Ct. 270, 67 L. Ed. 605. Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument. This was done

in the instant case and constitutes a "full hearing" for consideration of the limited contention made by the petitioner in its complaint and by its election not to submit evidence.

The most casual study of Regulation 10(c) shows the intent and effect of the rule to be an attempt to safeguard what the stockyard considers its normal market. Marketing agencies are not prohibited from dealing elsewhere entirely but are denied the services of the Denver yard if they even "endeavor to secure customers (within the pro-[fol. 88] hibited geographic area) to sell or purchase elsewhere" than the Denver yards. The compulsion of the regulation is in immediate conflict with the requirement of Sec. 304 which contemplates and imposes the duty upon marketing agencies to render reasonable services to its customers at *every* stockyard where they do business. If by rendering a reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another.

Although it may be argued that attempts, successful or otherwise, by a marketing agency to divert business from a stockyard may result in disharmony between the parties and thereby lower the ability of both to render efficient service, still such argument, even if proved to be soundly based in fact, has no legal significance. The test of the validity of the regulation is not so dependent. Nor does the stockyard have the right to exclude from its yards those persons who lawfully trod upon its economic toes. The operation of a stockyard is affected with a public interest and devoted to a public use. Any properly exclusionary [fol. 89] regulation must be based upon more than economic or personal desirability or its lack, for the duty to furnish services under the Act cannot be abrogated by considerations of the parties which might form a valid basis of private contract. *Carnes* v. *St. Paul Union Stockyards Co.*, 164 Minn. 457, 205 N.W. 630; *Nashville Union Stockyards* v. *Grissim*, 153 Tenn. 225, 280 S.W. 1015; *Farmers' Livestock Commission Co.* v. *U. S.* (D.C.E.D. Ill.) 54 F.2d 375.

Stockyard companies are not monopolies and are in fact in active competition one with the other. The rights and duties thus occasioned must be correlated with the rights and duties of other entities recognized under the Act, and, both, finally, with the paramount public interest. An exclusionary regulation based upon diversion of business, such as we here consider, unlawfully restricts petitioner as a marketing agency and wounds the public interest. The persuasive words of the Supreme Court of Tennessee, passing upon the legality of a comparable situation, are in accord.

> "Furthermore, we fail to find anything in the Packer's and Stockyard's Act that requires defendant or his employer to transact all of their business of receiving, buying and selling livestock on complainant's [fol. 90] premises or from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the act which requires . . . the defendants to do all their business with complainant . . ." *Nashville Union Stockyards* v. *Grissim*, *supra*.

The judicial officer expressed some concern as to whether he could properly consider this case absent some showing that the business done by petitioner with the stockyards was interstate commerce. Since the regulation was designed to affect all of the agents or dealers within the area, the question of petitioner's business does not arise, for whatever amounts to a constant practice and threatens to obstruct or unduly burden interstate commerce is within the regulatory power of Congress under the commerce clause, even though in a particular instance it affects only intrastate commerce. *Stafford* v. *Wallace*, *supra*, Note 9. Other contentions presented by the proponents of the regulation have been considered by us and deemed to be without merit.

We conclude that Regulation 10(c) is an unlawful restriction upon the statutory rights and duties of petitioners and all market agencies and bears no reasonable rela- [fol. 91] tionship to the duties required of the stockyard company under the provision of the Packers and Stock-

yards Act. The regulation is invalid upon its face and the cause is accordingly Remanded with instructions to vacate the order dismissing petitioner's complaint and enter an appropriate order requiring the Denver Union Stockyard Company to cease and desist from issuing or enforcing its Regulation 10(c).

[fol. 92] IN UNITED STATES COURT OF APPEALS

JUDGMENT—February 15, 1957

Before Honorable WALTER A. HUXMAN, Honorable JOHN C. PICKETT and Honorable DAVID T. LEWIS, Circuit Judges.

This cause came on to be heard on the petition to review the decision and order of the Secretary of Agriculture, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the regulation is invalid upon its face and that this cause is accordingly remanded to the Secretary of Agriculture with instructions to vacate the order dismissing petitioner's complaint and enter an appropriate order requiring the Denver Union Stockyard Company to cease and desist from issuing or enforcing its Regulation 10(c). It is further ordered that Producers Livestock Marketing Association, a corporation of Salt Lake City, Utah, petitioner, have and recover of and from Denver Union Stockyard Company, respondent, its costs herein.

IN UNITED STATES COURT OF APPEALS

NOTE RE MANDATE

[By order of March 20, 1957, the mandate of the United States Court of Appeals was stayed for a period of thirty days from March 22, 1957, under provision of paragraph 3 of rule 28.]

[fol. 93] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5459

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a Corporation of Salt Lake City, Utah, Petitioner,

v.

UNITED STATES and EZRA TAFT BENSON, Secretary of Agriculture, Respondents.

DESIGNATION BY SECRETARY OF AGRICULTURE OF ADDITIONAL PORTIONS OF TRANSCRIPT TO BE CONTAINED IN REPRODUCED RECORD—Filed August 27, 1956

Ezra Taft Benson, Secretary of Agriculture of the United States, hereby designates the following portions of the transcript of the record in this case as the portions of the transcript to be contained in the reproduced record, in addition to the portions of the transcript set forth in the Petitioner's Designation of Portions of Transcript To Be Contained in Reproduced Record:

1. Letter dated July 8, 1955, from Hearing Clerk to Denver Union Stock Yard Company and Mr. Ashley Sellers;
2. Motion For Order To Require Complainant To Produce Specified Books and Records For Examination and Copying;
3. Affidavit of L. M. Pexton;

[fol. 94] 4. Reply To Motion For Order To Require Complainant To Produce Specified Books and Records For Examination And Copying Filed By Respondent;

5. Motion To Strike Complainant's Reply to Respondent's Motion For Order To Require Complainant To

Produce Specified Books and Records For Examination And Copying Filed By Respondent;

6. Stay Order dated September 15, 1955;

7. Memorandum dated September 21, 1955, from Assistant General Counsel to Hearing Clerk;

8. Statement dated September 21, 1955, by H. E. Reed, Director, Livestock Division, Agricultural Marketing Service;

9. Notice of Argument on Motion dated September 28 1955;

10. Telegram dated September 30, 1955, from Allen A. Lauterbach to Hearing Clerk;

11. Notice of Oral Argument on Motions dated October 11, 1955;

12. Affidavit of W. C. Crew, dated October 21, 1955;

13. Answer to Motion to Dismiss, dated December 29, 1955;

14. Order Allowing Briefs Amicus Curiae, dated February 24, 1956.

/s/ J. Stephen Doyle, Jr., Attorney, United States Department of Justice.

/s/ Neil Brooks, Assistant General Counsel, United States Department of Agriculture.

[fol. 94a] CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing designation were deposited on August 24, 1956, in the United States Post Office, with postage prepaid, addressed to H. P. Thomas, Esq., Thomas & Armstrong, 511 Walker Bank Building, Salt Lake City 11, Utah, and to Ashley Sellers, Esq., Cummings, Sellers, Reeves & Conner, 1625 K Street, N.W., Washington 6, D. C.

/s/ Neil Brooks, Assistant General Counsel, United States Department of Agriculture.

[fol. 95] CLERK'S CERTIFICATE TO FOREGOING PAPER (omitted in printing).

[fol. 96] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 97] SUPREME COURT OF THE UNITED STATES

No. 917, October Term, 1956

THE DENVER UNION STOCK YARD COMPANY, Petitioner,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION.

ORDER ALLOWING CERTIORARI—Filed June 3, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with No. 981 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 98] SUPREME COURT OF THE UNITED STATES

No. 981, October Term, 1956

EZRA TAFT BENSON, Secretary of Agriculture of the United States, Petitioner,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION.

ORDER ALLOWING CERTIORARI—Filed June 3, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with No. 917 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.